

INCONSISTENT JURY VERDICTS RETURNED ON A MULTIPLE COUNT INDICTMENT OF A SINGLE DEFENDANT

On September 1, 1967, a motor vehicle recklessly operated by Herbert A. DeSacia forced a Ford Ranchero off the road and into the Chena River. The driver of the Ranchero and one of his passengers died in the accident. The State of Alaska charged DeSacia with two counts of manslaughter. Despite the virtually identical evidence presented by the prosecutor on both counts, a jury found DeSacia guilty of the manslaughter of the driver and not guilty of the manslaughter of the passenger. These seemingly inconsistent verdicts sparked a debate in Alaska that had already surfaced in other jurisdictions. The debate over the effect of verdict inconsistency continues and provides the subject matter of this note.

I. INTRODUCTION

Inconsistent jury verdicts may arise in criminal cases involving multiple defendants as well as in those involving a single defendant prosecuted under a multiple or single count indictment.¹ An inconsistency is said to exist in such cases when two or more verdicts, or the jury's findings of fact and its general verdict, lack rational compatibility.²

English common law courts consistently refused to enter a judgment of conviction on inconsistent jury verdicts.³ The courts adhered

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1. Verdict inconsistency is said to exist in criminal cases involving a single defendant prosecuted under a single count indictment when the jury's factual findings conflict with its general verdict.

2. See Annotation, *Inconsistency of Criminal Verdict as Between Different Counts of Indictment or Information*, 18 A.L.R. 3D 259, 269 (1968).

3. Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 COLUM. L. REV. 999, 1001 (1960); see, e.g., *Rex v. Woodfall*, 98 ENG. REP. 398 (1770) (where defendant was charged with printing and publishing a seditious libel and jury returned verdict of "guilty of the printing and publishing only," the court ordered a new trial, noting that the verdict could be interpreted as *inconsistent* with jury's factual findings); *The King v. Colson*, 87 ENG. REP. 47 (1685) (conviction reversed where defendant charged with "riotously diverting a watercourse" and jury found defendant guilty of diverting a watercourse but not guilty of the riot); *Regina v. Gray*, 17 COX'S CRIM. L. CAS. 299 (1891) (conviction for obtaining money under false pretenses overturned because it was "inconsistent" with the jury's finding of no intent to defraud).

to this rule whether the case involved one defendant and a single verdict,⁴ one defendant and multiple verdicts,⁵ or multiple defendants.⁶

Unlike their English counterparts, American courts heard few cases concerning the proper treatment of inconsistent jury verdicts prior to 1920. Not until the use of multiple count indictments gained popularity in the early 1920's did the issue receive substantial attention in the United States. The increased use of multiple count indictments provided the stimulus for far-reaching judicial and legislative analysis of inconsistent verdicts, particularly with regard to inconsistent verdicts returned by a jury pursuant to the multiple count indictment of a single defendant.

Due to the comprehensive nature of this subject, this note focuses only on the treatment of inconsistency between an acquittal and a conviction returned by a jury at the trial of a single defendant.⁷ Part II of this note examines the federal "rule" that inconsistency between verdicts does not invalidate a conviction and discusses California's approach to inconsistent verdicts. Part III contains a detailed analysis of Alaska case law on this subject, beginning with the landmark decision of *DeSacia v. State*.⁸ Finally, Part IV identifies a number of weaknesses in Alaska's current approach to verdict inconsistency and concludes with recommendations for the future treatment of inconsistent verdicts by Alaska courts.

II. THE FEDERAL "RULE" AND THE CALIFORNIA "ESSENTIAL ELEMENTS" APPROACH

A. The Federal "Rule"

As soon as American courts addressed the inconsistent jury verdict issue, a divergence in opinion emerged.⁹ Between 1921 and 1929, the majority of the cases decided by the Third, Eighth, and Ninth Circuits adopted the common law requirement of verdict consistency.¹⁰

4. *Regina v. Gray*, 17 COX'S CRIM. L. CAS. 299 (1891); *Rex v. Woodfall*, 98 ENG. REP. 398 (1770); *The King v. Colson*, 87 ENG. REP. 47 (1685).

5. *The Queen v. Evans*, 7 COX'S CRIM. L. CAS. 151 (1856).

6. *The Queen v. Manning*, 12 Q.B.D. 241 (1883); *The Queen v. Thompson*, 117 ENG. REP. 1100 (1851); *Harison v. Errington*, 79 ENG. REP. 1292 (1627).

7. Unless otherwise stated, all references to verdict inconsistency refer to inconsistency between an acquittal and a conviction returned by a jury at the trial of a single defendant.

8. 469 P.2d 369 (Alaska 1970).

9. In 1960, 15 states adhered to the federal rule, which regards verdict inconsistency as immaterial, while 10 states expressly rejected the applicability of that rule within their jurisdictions. Comment, *supra* note 3, at 1002 n.18.

10. See, e.g., *Speiller v. United States*, 31 F.2d 682 (3d Cir. 1929); *Murphy v. United States*, 18 F.2d 509 (8th Cir. 1927); *Peru v. United States*, 4 F.2d 881 (8th Cir. 1925); *John Hohenadel Brewing Co. v. United States*, 295 F. 489 (3d Cir. 1924);

The Second, Sixth, and Seventh Circuits, on the other hand, typically upheld apparently inconsistent verdicts.¹¹

*John Hohenadel Brewing Co. v. United States*¹² typifies the approach to verdict consistency taken by the Third, Eighth, and Ninth Circuits. In that case, an indictment containing seven counts had been filed against the brewing company. The first six counts alleged the unlawful manufacture and sale of intoxicating liquor, while the seventh count charged the defendant with maintaining a common nuisance. The prosecution based the common nuisance charge on the theory that the defendant maintained his premises for the purpose of keeping, bartering, and selling intoxicating liquor. The jury acquitted the defendant on the first six counts and returned a verdict of guilty on the seventh. The court of appeals affirmed only because "the verdict of guilty [was] . . . based on evidence other than that pleaded in support of the first six counts."¹³ Had the evidence been identical, an acquittal on the first six counts would have "negatived" the common nuisance charge and compelled a reversal of the conviction.¹⁴

*Gozner v. United States*¹⁵ exemplifies the position taken by the Second, Sixth, and Seventh Circuits with regard to verdict consistency. In *Gozner*, a multiple count indictment charged the defendant with possessing property used in the manufacture of intoxicating liquor, possessing intoxicating liquor, manufacturing intoxicating liquor, and maintaining a common nuisance. Virtually identical evidence was introduced on each count. The jury found the defendant not guilty of the charges in the first three counts, but convicted him of maintaining a common nuisance. In affirming the conviction, the Sixth Circuit reasoned that each count of an indictment is, "in contemplation of law, a separate and distinct indictment."¹⁶ Therefore, the jury's findings on one count do not affect or limit its findings on any other counts, and inconsistent verdicts may stand.¹⁷ When a jury returns inconsistent verdicts, "if it be assumed that one of the verdicts

Baldini v. United States, 286 F. 133 (9th Cir.), *cert. denied*, 262 U.S. 749 (1923); *Rosenthal v. United States*, 276 F. 714 (9th Cir. 1921). *But cf.* *Corbin v. United States*, 205 F. 278, 280 (8th Cir. 1913) ("[T]he withdrawal of one count, by directing a verdict at the final submission of the case, does not affect the other [counts].").

11. *See, e.g.*, *Seiden v. United States*, 16 F.2d 197 (2d Cir. 1926); *Gozner v. United States*, 9 F.2d 603 (6th Cir. 1925); *Steckler v. United States*, 7 F.2d 59 (2d Cir. 1925); *Marshallo v. United States*, 298 F. 74 (2d Cir. 1924); *Carrigan v. United States*, 290 F. 189 (7th Cir. 1923); *see also* *Gee Woe v. United States*, 250 F. 428 (5th Cir. 1918) (holding that reversal of conviction not required when inconsistency exists).

12. 295 F. 489 (3d Cir. 1924).

13. *Id.* at 490.

14. *Id.* at 490-91.

15. 9 F.2d 603 (6th Cir. 1925).

16. *Id.* at 604.

17. *Id.*

is erroneous, there is at least as much reason to consider the verdict of innocence incorrect as there is to consider the verdict of guilt improper."¹⁸

This conflict among the circuit courts led the United States Supreme Court to grant certiorari in *Dunn v. United States*.¹⁹ In *Dunn*, a multiple count indictment charged the defendant with possessing intoxicating liquor, selling intoxicating liquor, and maintaining a common nuisance by keeping intoxicating liquor for sale. At trial, the prosecution presented identical evidence on all three counts. The jury found the defendant guilty of maintaining a common nuisance and acquitted him of the remaining charges. On appeal, the defendant argued that the jury's return of inconsistent verdicts compelled the reversal of his conviction. In the defendant's opinion, the circumstances of his case required that the jury find him guilty of possessing intoxicating liquor in order to convict him of maintaining a common nuisance.²⁰ The Supreme Court flatly rejected the defendant's position and declared that compatibility between verdicts returned on a multiple count indictment is not necessary.²¹

The Court articulated two separate bases for its decision. The first basis reflected the Court's belief that each count in an indictment constituted "a separate indictment."²² In holding that verdict inconsistency failed to constitute grounds for the reversal of the defendant's conviction, the Court reasoned that:

[I]f separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.²³

The second rationale espoused by the Court centered around the historic power of juries to check arbitrary government action by showing leniency to defendants. According to the Court, the lack of consistency between verdicts did not necessarily indicate that the jury was unconvinced of the defendant's guilt. To the contrary, the jury's return of inconsistent verdicts may have represented an exercise of leniency. Although the jury had no "right" to return verdicts resulting from compromise, it did have the "power" to do so.²⁴ In light of the

18. *Id.*

19. 284 U.S. 390 (1932).

20. *Id.* at 391.

21. *Id.* at 393.

22. *Id.*

23. *Id.*

24. *Id.*

fact that the jury may merely have taken advantage of one of its powers, and to avoid undue encroachment upon the role of the jury, the Court permitted the conviction to stand.

After the Supreme Court's holding in *Dunn*, the courts of appeals generally adhered to the principle that jury verdicts returned on a multiple count indictment of a single defendant need not demonstrate consistency.²⁵ Over time, however, some courts began to recognize exceptions to the rule enunciated in *Dunn*.²⁶ In 1984, concern over the validity and extent of these exceptions prompted the Supreme Court to grant certiorari in *United States v. Powell*.²⁷

A fifteen count indictment charged Powell with violating federal narcotics and firearms laws. When the case reached the Supreme Court, the controversy centered around counts one, three, four, five, six, and nine.²⁸ Count one charged the defendant with conspiring to possess cocaine with the intent to distribute the narcotic. Count nine alleged that the defendant unlawfully possessed cocaine with the intent to distribute. Counts three through six charged the defendant with using the telephone to facilitate the crimes charged in counts one and nine.²⁹ The jury convicted the defendant of counts three, four, and five and acquitted her of counts one, six, and nine.

On appeal to the Ninth Circuit, the defendant argued that the court should reverse the telephone facilitation convictions because the jury's verdicts were incompatible. She insisted that her acquittal on

25. *United States v. Cyr*, 712 F.2d 729 (1st Cir. 1983); *United States v. Colson*, 662 F.2d 1389 (11th Cir. 1981); *United States v. Jacobs*, 632 F.2d 695 (7th Cir. 1980); *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980); *United States v. Rios Ruiz*, 579 F.2d 670 (1st Cir. 1978); *United States v. Dennett*, 551 F.2d 261 (10th Cir. 1977); *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States v. Joyce*, 499 F.2d 9 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); *United States v. Manglona*, 414 F.2d 642 (9th Cir. 1969); *United States v. Grow*, 394 F.2d 182 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968); *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); *United States v. Vastine*, 363 F.2d 853 (3d Cir. 1966); *Rua v. United States*, 321 F.2d 140 (5th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964); *Downing v. United States*, 157 F.2d 738 (8th Cir. 1946); *Williams v. United States*, 151 F.2d 736 (4th Cir. 1945); *Telfian v. Sanford*, 147 F.2d 945 (5th Cir.), *cert. denied*, 325 U.S. 869 (1945); *Thomas v. Hudspeth*, 127 F.2d 976 (10th Cir. 1942); *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

26. *United States v. Brooks*, 703 F.2d 1273 (11th Cir. 1983); *United States v. Hannah*, 584 F.2d 27 (3d Cir. 1978). In both *Brooks* and *Hannah*, the courts reasoned that *Dunn* should not apply because the conspiracy count and the facilitation count could not be viewed as separate and distinct indictments.

27. 469 U.S. 57 (1984).

28. The jury returned a guilty verdict on only one of the nine counts not in controversy. The defendant was found guilty of giving false information in her petition for court-appointed counsel. *Id.* at 59 n.2.

29. 21 U.S.C. § 843(b) (1982).

counts one and nine negated essential elements of the crimes charged in counts three, four, five, and six. The defendant questioned, for example, how one could be convicted of using the telephone to facilitate a conspiracy without being found guilty of the conspiracy. In this instance, the Ninth Circuit, while claiming to adhere to the *Dunn* rule, agreed with the defendant and reversed.³⁰ The court believed that cases involving a defendant who was convicted of facilitating a felony but acquitted of committing that felony called for an exception to the *Dunn* rule.³¹

When *Powell* reached the Supreme Court, the Court reaffirmed the principle that jury verdicts may stand despite the lack of rational compatibility, and declined to recognize exceptions to the *Dunn* rule.³² Because the Court found a defect in the res judicata rationale behind the *Dunn* opinion,³³ the "power of the jury" line of reasoning emerged as the sole rationale for upholding the *Dunn* rule. The *Powell* Court found that rationale sufficient to support a reversal of the Ninth Circuit.

According to the Court, the holding in *Dunn* "embodies a prudent" recognition of several factors.³⁴ First,

inconsistent verdicts . . . present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored.

30. *United States v. Powell*, 708 F.2d 455 (9th Cir. 1983), *rev'd*, 469 U.S. 57 (1984).

31. *Id.* at 457.

32. *Powell*, 469 U.S. at 69. The *Powell* Court specifically stated, however, that it was not deciding the proper disposition of cases where the defendant is convicted of two crimes and where a finding of guilt on one count logically excludes a guilty verdict on the other. *Id.* at 69 n.8. The court then cited *United States v. Daigle*, 149 F. Supp. 409 (D.D.C.), *aff'd per curiam*, 248 F.2d 608 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 913 (1958), which required the reversal of guilty verdicts on mutually exclusive crimes.

33. In *Dunn*, the Court stated that if "separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other." 284 U.S. at 393. The Court then concluded that the rule must also apply when the prosecution uses a multi-count indictment. *Id.*

The *Powell* Court noted that the res judicata analysis in *Dunn* could no longer withstand judicial scrutiny. Subsequent to *Dunn*, the Supreme Court held that the doctrine of res judicata applied in both criminal and civil cases to preclude the relitigation of issues covered in a prior verdict even if different offenses were charged. *Sealfon v. United States*, 332 U.S. 575, 578 (1947); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443.

34. *Powell*, 469 U.S. at 65.

Given this uncertainty, and the fact that the government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. *Harris v. Riveria* . . . indicates that nothing in the Constitution would require such a protection.³⁵

Second, the *Dunn* rule permits juries to check oppressive government conduct.³⁶ If the government is unduly harassing a defendant who appears to be guilty, the jury need not set the defendant free to compensate for the abuse of power by the government. Instead, the jury may exercise its power to acquit the defendant on some of the charges. Third, attempts to determine reasons behind the inconsistency on a case-by-case basis would lead to "pure speculation" or invasions into a "jury's thought processes."³⁷ Finally, independent trial and appellate court review of the sufficiency of the evidence already provides a certain degree of protection to criminal defendants.³⁸

B. The California Approach

In most situations involving inconsistent jury verdicts, California follows the federal rule that verdict inconsistency does not constitute a ground for the reversal of a conviction. Section 954 of the California Penal Code provides, in part, that "[a]n acquittal of one or more counts [set forth in the accusatory pleading] shall not be deemed an acquittal of any other count."³⁹ California courts consistently interpret this portion of the provision to mean "that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein."⁴⁰ Accordingly, where the weight of the evidence supports a conviction, the guilty verdict stands despite the existence of an apparently inconsistent verdict of acquittal.⁴¹

California recognizes one exception to the general proposition that inconsistency affords no basis for reversal:

35. *Id.*

36. *Id.*

37. *Id.* at 66.

38. *Id.* at 67.

39. CAL. PENAL CODE § 954 (West 1985).

40. *People v. Ranney*, 123 Cal. App. 403, 407, 11 P.2d 405, 406 (1932); *see People v. Amick*, 20 Cal. 2d 247, 252, 125 P.2d 25, 28 (1942); *People v. Walker*, 146 Cal. App. 3d 34, 38, 193 Cal. Rptr. 834, 836 (1983); *People v. Federico*, 127 Cal. App. 3d 20, 32, 179 Cal. Rptr. 315, 322 (1981); *People v. Hamilton*, 80 Cal. App. 3d 124, 129-30, 145 Cal. Rptr. 429, 432 (1978); *People v. Calpito*, 9 Cal. App. 3d 212, 219, 88 Cal. Rptr. 64, 67-68 (1970).

41. *Hamilton*, 80 Cal. App. 3d at 130, 145 Cal. Rptr. at 432; *see Walker*, 146 Cal. App. 3d at 38, 193 Cal. Rptr. at 836.

[Inconsistency invalidates a conviction] where all of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted, and proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of which the defendant was found guilty.⁴²

Thus, in deciding whether to reverse a conviction on the basis of verdict inconsistency, California courts limit their inquiry to the elements of the crimes charged.⁴³

Few verdicts demonstrate the type of inconsistency required for reversal in California. One of the rare instances in which inconsistency provides a basis for reversal occurs when a defendant is found guilty of conspiracy but innocent of all crimes alleged to be overt acts of the conspiracy.⁴⁴ Such cases fulfill both of the conditions previously discussed. First, the essential elements of the conspiracy charge necessarily include all essential elements of the crimes alleged to be the overt acts committed in furtherance of the conspiracy. Second, the prosecution must prove the commission of at least one of these overt acts to sustain a conviction of conspiracy.⁴⁵

An acquittal on one or more charges in a multiple count indictment necessarily decides certain issues in favor of the defendant. Accordingly, the reversal of a conviction due to inconsistency with an acquittal raises the issue of the propriety of relitigating the conviction. Under California law, collateral estoppel bars the reconsideration of an issue litigated at a prior criminal trial when:

1. the issue necessarily decided at the previous trial is identical to the one which is sought to be relitigated; . . .
2. the previous trial resulted in a final judgment on the merits; and . . .

42. *Hamilton*, 80 Cal. App. 3d at 130, 145 Cal. Rptr. at 432; see *Walker*, 146 Cal. App. 3d at 38, 193 Cal. Rptr. at 836; *Federico*, 127 Cal. App. 3d at 32, 179 Cal. Rptr. at 322-23. *Powell* made it clear that this exception is not available under the federal rule. See *supra* notes 27-38 and accompanying text.

43. See *Hamilton*, 80 Cal. App. 3d at 130, 145 Cal. Rptr. at 432. In *Hamilton*, the court noted that even if the defendant's conviction of felony hit-and-run driving could not be factually supported absent a finding that he had participated in either a speed contest or speed exhibition, acquittal on the two speed offenses did not bring him within the exception to section 954 of the California Penal Code. Section 954 permitted such "inconsistency" because the essential elements of the two speed offenses differed from the essential elements of felony hit-and-run driving. *Id.* at 130-31, 145 Cal. Rptr. at 432. *But cf.* *People v. Simmons*, 82 Cal. App. 3d Supp. 1, 147 Cal. Rptr. 481 (1978) (court suggested that exception to section 954 is appropriate when irreconcilable inconsistency exists even if elements of crimes charged not identical).

44. See *In re Johnston*, 3 Cal. 2d 32, 43 P.2d 541 (1935); *Oliver v. Superior Court*, 92 Cal. App. 94, 267 P. 764 (1928); see also *Hamilton*, 80 Cal. App. 3d at 130, 145 Cal. Rptr. at 432 (noting that acquittal on overt act of conspiracy provides basis for reversal of conspiracy conviction).

45. *Oliver*, 92 Cal. App. at 97, 267 P. at 765.

3. the party against whom collateral estoppel is assessed was a party or in privity with a party at the prior trial.⁴⁶

Cases reversed because of verdict inconsistency should satisfy the criteria for the application of collateral estoppel.⁴⁷ First, California courts will upset a conviction only when one or more verdicts of acquittal returned by the jury negative an essential element of the crime of which the defendant was found guilty.⁴⁸ A retrial of the conviction would, therefore, necessarily raise issues decided by the prior acquittal. The prosecution could not relitigate the conviction without alleging all essential elements of the crime. Second, absent extraordinary circumstances, an acquittal at the trial level would stand as a final judgment on the merits. The fifth amendment's prohibition against double jeopardy mandates such a result.⁴⁹ Finally, the state, the party to be bound by the estoppel, did participate in the prior trial.⁵⁰

III. THE TREATMENT OF INCONSISTENT JURY VERDICTS IN ALASKA

A. *DeSacia v. State*

The Alaska Supreme Court first addressed the issue of verdict inconsistency and its effect upon the jury's findings in *DeSacia v. State*.⁵¹ After thorough consideration, the court decided that Alaska should stand among those states that reject the federal rule, at least when the case involves strictly inconsistent verdicts. In addition to analyzing the rationale behind the *Dunn* holding, *DeSacia* discussed many procedural and substantive "sub-issues" that require attention when inconsistency infects a jury verdict.

Both counts of the indictment charged DeSacia with manslaughter.⁵² The evidence introduced in support of each count tended to show that by his careless operation of a motor vehicle, DeSacia forced

46. *People v. Taylor*, 12 Cal. 3d 686, 691, 527 P.2d 622, 625, 117 Cal. Rptr. 70, 73 (1974); see *People v. Superior Court*, 44 Cal. App. 3d 494, 501, 118 Cal. Rptr. 702, 706 (1975).

47. Two cases decided prior to *Taylor* provide support for this conclusion. In both *In re Johnston*, 3 Cal. 2d 32, 43 P.2d 541 (1935), and *Oliver v. Superior Court*, 92 Cal. App. 94, 267 P. 764 (1928), the courts proscribed further prosecution of the defendant after reversing a criminal conspiracy conviction because the jury had returned an acquittal on all overt acts of the conspiracy. This conclusion also comports with federal law. See *supra* note 33.

48. See *supra* note 42 and accompanying text.

49. See *infra* notes 67-72 and accompanying text.

50. *People v. Superior Court*, 44 Cal. App. 3d at 501, 118 Cal. Rptr. at 706.

51. 469 P.2d 369 (Alaska 1970).

52. *Id.* at 370. The manslaughter statute under which DeSacia was indicted was former ALASKA STAT. § 11.15.040 (1962) (codified as amended by 1978 Alaska Sess. Laws, ch. 166, § 3, at ALASKA STAT. § 11.41.120 (1983)).

a Ford Ranchero and its occupants into the Chena River. The driver of the Ranchero and one of his passengers died as a result of the accident. Despite the virtually identical evidence presented by the prosecution on both counts, the jury found the defendant guilty of the manslaughter of the driver and not guilty of the manslaughter of the passenger.⁵³

Faced with these conflicting verdicts, the Alaska Supreme Court held that "strictly inconsistent" verdicts, such as the ones at bar, could not stand.⁵⁴ The court disagreed with the assumption in *Dunn* that many, if not all, inconsistent verdicts result from jury leniency.⁵⁵ In the court's view, inconsistent verdicts could also be attributable to, among other things, compromise or confusion. The court stated that it had "no reliable way to discover what really lies behind the inconsistent verdicts; and any conclusions — any assumptions on our part — would not be warranted."⁵⁶ Instead of speculating as to the jury's thought processes, the court limited its inquiry to the rationality of the result. The court noted that each count of the indictment charged DeSacia with identical conduct and with the same degree of culpability toward the vehicle in which both victims were riding. DeSacia could not, therefore, have been more negligent toward one victim than the other. In light of the fact that the acquittal and conviction of manslaughter, when viewed together, displayed irrational inconsistencies, the court reversed the defendant's conviction and ordered a new trial on the charges included in the overturned conviction. The court "[could] conceive of no reason why, under [the] circumstances, [it could not] require at the very least, a minimal degree of reasonableness in the rendering of jury verdicts."⁵⁷

Because Alaska's position encourages defendants to appeal on the grounds of verdict inconsistency and provides for a retrial when an appeal succeeds, the *DeSacia* opinion necessarily addressed a number of issues that jurisdictions following the federal rule need not consider. These issues are discussed in the following subsections.

1. *When must a defendant challenge the consistency of the verdicts?*
In *DeSacia*, the state contended that the defendant lost his right to

53. *DeSacia*, 469 P.2d at 371. The evidence differed only as to the medical cause of death of the driver of the Ranchero and his passenger, which had "no bearing whatsoever on the elements of the crime charged." *Id.* at 374.

54. *Id.* at 378. It appears that the *DeSacia* court used the phrases "strictly inconsistent" and "irreconcilably inconsistent" interchangeably. Subsequent Alaska opinions appear to have done the same. These phrases will, therefore, be used interchangeably in this note.

55. See *supra* text accompanying notes 24 & 36.

56. *DeSacia*, 469 P.2d at 378.

57. *Id.*

appeal when he failed to make a timely motion for acquittal before seeking a judgment notwithstanding the verdict. Under the laws of Alaska, a motion for acquittal could only have been made at the close of the state's evidence or at the close of the defendant's evidence.⁵⁸ The court rejected the state's argument because it would require defendants to raise the issue of inconsistency before the jury returns the verdicts and before any inconsistency could possibly exist.⁵⁹ Thus, under *DeSacia*, a defendant need not challenge verdict inconsistency until the jury returns its verdict.

2. *What is the significance of a defendant's failure to make timely objections to jury instructions that facilitate the return of inconsistent verdicts?* *DeSacia* made it clear that if the error in accepting the verdicts is plain, Criminal Rule 47(b)⁶⁰ permits a defendant to appeal his conviction even though he did not voice objection to a disputed jury instruction at trial.⁶¹ "A plain error is one that is obvious and prejudicial."⁶² The court provided less guidance as to the result in a case not involving plain error. It left open the question of when, in such a case, failure to make a timely objection to jury instructions that permit inconsistencies to arise forecloses an appeal.

In *DeSacia*, the state argued that the defendant's failure to object to a certain instruction foreclosed consideration of his appeal.⁶³ To support its position, the state cited cases standing for the proposition that absent a timely objection to instructions facilitating inconsistency, a defendant's objections do not deserve notice on appeal.⁶⁴ Although these cases had little, if any, influence on the holding in *DeSacia* because of the finding of plain error, they led the court to identify two pertinent areas of inquiry for future cases. First, did the "overwhelming weight of the evidence" show the defendant's guilt?⁶⁵ Second, did the instruction given to the jury specifically state that the court would

58. ALASKA R. CRIM. P. 29.

59. *DeSacia*, 469 P.2d at 372-73.

60. Alaska Rule of Criminal Procedure 47(b) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

61. *DeSacia*, 469 P.2d at 373.

62. *Davis v. State*, 684 P.2d 147, 150 (Alaska Ct. App. 1984).

63. *DeSacia*, 469 P.2d at 373. The controversial instruction provided:

You will note that a separate and distinct crime is charged in each Count of the Indictment. Each crime and the evidence applicable thereto should be considered separately. Your verdict with respect to either one of the crimes charged should in no way influence or control your verdict with respect to the other crime charged.

Id. at 373 n.7.

64. *Id.* at 373 n.6.

65. *Id.* at 373.

accept inconsistent verdicts?⁶⁶ If the court can answer either, or both, of the questions in the affirmative and the defendant failed to object to the disputed instruction at trial, the *DeSacia* opinion arguably implies that disallowance of the appeal may be appropriate where plain error does not exist.

3. *What effect does a finding of inconsistency have on the verdict(s) of acquittal?* In *DeSacia*, the Alaska Supreme Court recognized that all verdicts of acquittal must stand.⁶⁷ The court held that retrying the counts upon which the defendant had been acquitted would violate the double jeopardy clause in the constitutions of the United States and Alaska.⁶⁸ Only one year prior to *DeSacia*, the United States Supreme Court had declared that the fifth amendment's proscription of double jeopardy applied to the states.⁶⁹ In light of this declaration, the *DeSacia* court found *Green v. United States*⁷⁰ controlling. The Supreme Court had stated in *Green* that "it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."⁷¹ A defendant does not waive the protections afforded by the double jeopardy clause when he appeals a conviction on another charge.⁷²

4. *May the court remand the reversed conviction for retrial?* When confronting the issue of whether a court can remand a reversed conviction for retrial, the *DeSacia* court recognized that collateral estoppel arguably could preclude a retrial because "the state would have to adduce essentially the same evidence which was ruled upon when *DeSacia* was acquitted on Count I."⁷³ At the time that *DeSacia* was

66. *Id.* The *DeSacia* court answered both of these questions in the negative. *Id.* Note, however, that an affirmative answer to the second inquiry would indicate that the trial judge had expressly told the jury that it could return inconsistent verdicts. Such an instruction would probably constitute plain error, permitting the court to hear the appeal despite the defendant's failure to object. ALASKA R. CRIM. P. 47(b).

67. *DeSacia*, 469 P.2d at 378.

68. *Id.* The fifth amendment to the United States Constitution provides in pertinent part: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Alaska Constitution similarly provides that: "No person shall be put in jeopardy twice for the same offense." ALASKA CONST. art. 1, § 9.

69. See *Benton v. Maryland*, 395 U.S. 784 (1969).

70. 355 U.S. 184 (1957).

71. *Id.* at 188.

72. *Id.* at 191-98.

73. 469 P.2d at 379. The court summarily dismissed the proposition that double jeopardy might preclude a retrial of the reversed conviction. When a defendant appeals his conviction, he waives his right to the double jeopardy defense with respect to

decided, Alaska law provided that collateral estoppel applied in criminal as well as civil matters to prevent the relitigation of issues validly and finally resolved by a jury.⁷⁴ In addition, the United States Supreme Court had recently given collateral estoppel constitutional significance by holding that it was "embodied" in the guarantee against double jeopardy.⁷⁵

After noting a lack of precedent, the *DeSacia* court stated that it would follow the Supreme Court's suggestion in *Ashe v. Swenson*⁷⁶ to use "realism and rationality" in the application of collateral estoppel instead of the "hypertechnical and archaic approach of a 19th Century pleading book."⁷⁷ This "realism" led the court to conclude that verdict inconsistency casts doubt upon the acquittal as well as the conviction. Because collateral estoppel only precludes the relitigation of issues of fact that the court "confidently" feels were decided in the prior acquittal, the doctrine was held not to prohibit retrial of the conviction.⁷⁸

The court also stressed the "fairness" of its decision not to apply collateral estoppel. In the court's view, conducting a retrial would not unduly harass or prejudice the defendant. The court likened this case to any other in which a retrial follows a successful appeal.⁷⁹ On the other hand, disallowance of a retrial would tip the balance too heavily in favor of the defendant. Allowing the defendant to question the validity of the verdicts returned by the jury and "to argue, in the same breath, that his acquittal is of sufficient certainty to suit the purposes of collateral estoppel" would severely prejudice the state.⁸⁰

B. Inconsistent Verdicts After *DeSacia*

Since *DeSacia*, a number of cases involving claims of inconsistent jury verdicts have reached the Alaska courts.⁸¹ In none of these cases has the deciding court questioned the underlying rationale behind the *DeSacia* holding. Indeed, the decisions uniformly adhere to the notion that the court has a right to require reasonableness in jury verdicts.

all charges included in that conviction. *United States v. Ball*, 163 U.S. 662, 671-72 (1896).

74. *See Dapevich v. State*, 360 P.2d 789 (Alaska 1961).

75. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).

76. 397 U.S. 436.

77. *DeSacia*, 469 P.2d at 380 (quoting *Ashe*, 397 U.S. at 444).

78. *Id.* at 380-81.

79. *Id.* at 381.

80. *Id.*

81. *Davenport v. State*, 543 P.2d 1204 (Alaska 1975); *Daygee v. State*, 514 P.2d 1159 (Alaska 1973); *Davis v. State*, 684 P.2d 147 (Alaska Ct. App. 1984); *Roberts v. State*, 680 P.2d 503 (Alaska Ct. App. 1984); *Born v. State*, 633 P.2d 1021 (Alaska Ct. App. 1981).

Alaska courts typically consider whether, based on the facts at hand, an irreconcilable conflict exists between an acquittal and a conviction that compels reversal of the conviction.⁸² A number of the "sub-issues" highlighted in *DeSacia* have also received attention.

1. *Procedural "Sub-Issues."* The Alaska Court of Appeals discussed the issue of the proper time to object to inconsistent verdicts in *Roberts v. State*⁸³ and *Davis v. State*.⁸⁴ In *Roberts*, the court of appeals outlined a two-step test which it subsequently applied in *Davis*. Under this test, the court first determines whether the defendant communicated his complaints regarding the verdicts to the trial court. Generally, an appellate court will not hear an appeal based on the existence of inconsistency between verdicts unless the defendant raises objection to the inconsistency before the trial court discharges the jury.⁸⁵ If the defendant fails to render a timely objection, the court proceeds to the second step, which involves an appraisal of the degree of the alleged inconsistency. When verdicts are obviously inconsistent and "appellate review is necessary to prevent manifest injustice," Criminal Rule 47(b)⁸⁶ applies and the court may consider the appeal regardless of the lack of timely objection to the verdicts.⁸⁷ "The meaning of Criminal Rule 47(b) is that [the court] may consider questions raised for the first time on appeal if necessary to effect substantial justice or prevent the denial of fundamental rights."⁸⁸

The difference between an irreconcilable inconsistency and an obvious inconsistency is vague. The *Davis* and *Roberts* opinions proceeded on the assumption that a distinction may be drawn between the two types of inconsistencies, but failed to set forth any distinguishing factors.⁸⁹ Despite the lack of clearly articulated standards in this area,

82. See, e.g., *Davis*, 684 P.2d 147.

83. 680 P.2d 503 (Alaska Ct. App. 1984).

84. 684 P.2d 147 (Alaska Ct. App. 1984).

85. *Roberts*, 680 P.2d at 507. The *Roberts* court repeatedly stressed the reasonableness of this test:

[T]he requirement of a timely objection seems less onerous in the context of inconsistent verdicts than with most claims of error arising during a trial. Unlike evidentiary rulings, which require an immediate objection in mid-trial, counsel will normally have ample opportunity to anticipate and call to the court's attention — either in proposing jury instructions or after final arguments, while the jury is deliberating — any possibility of inconsistent jury verdicts.

Id. at 507 n.11.

86. ALASKA R. CRIM. P. 47(b), quoted *supra* note 60.

87. *Roberts*, 680 P.2d at 507.

88. *DeSacia*, 469 P.2d at 373 (quoting *Hammonds v. State*, 442 P.2d 39, 43 (Alaska 1968)).

89. First, the *Davis* court held that the verdicts were irreconcilably inconsistent. 684 P.2d at 149. Mere irreconcilability did not, however, justify consideration of the

a close analysis of Alaska case law yields the following conclusions. First, the obviousness requirement only applies when the defendant fails to make a timely objection at trial to the inconsistent verdicts.⁹⁰ Second, if proof of the alleged inconsistency depends on a detailed examination of the facts and circumstances of the case, the court is not likely to find the requisite "obviousness."⁹¹ Only readily apparent inconsistencies are apt to be labeled obvious. This is most likely to occur where the elements of the crimes charged are identical.

In applying this two-tiered test, the court of appeals expanded upon *DeSacia*. The *DeSacia* court unequivocally rejected as "anomalous" the state's proposal that the defendant be required to challenge verdict consistency prior to the return of inconsistent verdicts.⁹² In addition, the *DeSacia* court recognized that failure to make any objection was irrelevant in cases involving plain error.⁹³ The Alaska Supreme Court did not, however, provide clear guidance as to when an objection is *timely*. The *Roberts* court filled this gap by holding that a *timely* objection to potential inconsistency is one raised prior to the discharge of the jury.⁹⁴ If this issue arises before the supreme court, the court will likely approve the *Roberts* test. The *Roberts* test adequately addresses the Alaska Supreme Court's concern over the "anomalous" requirement that the defendant question verdict consistency prior to the return of a verdict.⁹⁵ In addition, the Alaska Supreme Court has consistently maintained that civil litigants must object to potential inconsistency prior to the discharge of the jury.⁹⁶

Roberts also discussed the issue of failure to object to jury instructions. According to *Roberts*, when the defendant fails to object to instructions likely to promote inconsistent verdicts, the actions of defendant's trial counsel also influence the court's decision on whether

appeal. Because the defendant had failed to object to the inconsistency prior to the discharge of the jury, the court then proceeded to examine the "obviousness" of the inconsistency. Only after both findings did the court agree to entertain defendant's appeal. *See id.* at 150.

The *Roberts* court found "the question of inconsistency . . . to be a close one," but declined to consider the defendant's appeal because the verdict was not obvious and the defendant had failed to preserve the inconsistency issue properly. 680 P.2d at 504-06.

90. *See Roberts*, 680 P.2d at 507.

91. *See id.* at 505-06.

92. *DeSacia*, 469 P.2d at 372-73; *see supra* notes 58-59 and accompanying text.

93. 469 P.2d at 373.

94. 680 P.2d at 507.

95. For further discussion of the *DeSacia* court's concern over the requirement that a defendant question consistency prior to the return of a verdict, *see supra* notes 58-59 and accompanying text.

96. *See, e.g., City of Fairbanks v. Smith*, 525 P.2d 1095, 1097-98 (Alaska 1974); *Nordin Constr. Co. v. City of Nome*, 489 P.2d 455, 472 (Alaska 1971); *City of Homer v. Land's End Marine*, 459 P.2d 475, 479-80 (Alaska 1969).

to entertain an appeal. If trial counsel, as in *Roberts*, tells the jury during closing arguments that they should decide each count separately and that guilt on one charge does not preclude acquittal on the other, "[the defendant] is in a poor position to complain of any inconsistency [after the discharge of the jury]."⁹⁷ Once again the court of appeals has articulated a criterion that the Alaska Supreme Court, if given the opportunity, will likely adopt. Weighing trial counsel's actions when determining whether the defendant justifiably failed to object to certain jury instructions is entirely commensurate with *DeSacia*. It also seems inherently fair.

2. *Avoidance and Reconciliation of Inconsistent Verdicts.* The pertinent cases following *DeSacia* clearly indicate that only a high level of inconsistency will persuade the court to order the reversal and retrial of a conviction. Attempts to reconcile and to avoid inconsistent verdicts will be made by the court.⁹⁸ *Gravel v. State*⁹⁹ illustrates the lengths to which a trial court may go to avoid the jury's return of inconsistent verdicts.

In *Gravel*, the trial court found the first verdicts returned by the jury to be inconsistent and asked the jury to reconsider. The jury then returned consistent verdicts, but because polling of the jurors revealed disagreement, the court once again requested that the jury continue to deliberate. After further consideration, the jury returned unanimous and consistent verdicts.

The Supreme Court of Alaska approved of the methods used by the trial court to attain "legally valid verdicts."¹⁰⁰ The court declared that the trial judge is obligated to assure that the jury return a valid verdict whenever he may do so without unduly influencing the jury.¹⁰¹ The lack of coercive force on the part of the trial judge and defense counsel's acquiescence at trial constituted significant factors in the court's holding.¹⁰²

Most of the inconsistency claims arising in Alaska since *DeSacia* have been resolved through the process of reconciliation.¹⁰³ Reconciliation involves two interrelated steps. First, the court carefully analyzes the facts and circumstances of the case. Second, the court

97. *Roberts*, 680 P.2d at 507.

98. See *Davenport v. State*, 543 P.2d 1204 (Alaska 1975); *Gravel v. State*, 499 P.2d 1022 (Alaska 1972); *Davis v. State*, 684 P.2d 147 (Alaska Ct. App. 1984); *Roberts*, 680 P.2d 503; *Born v. State*, 633 P.2d 1021 (Alaska Ct. App. 1981).

99. 499 P.2d 1022 (Alaska 1972).

100. *Id.* at 1024.

101. *Id.*

102. *Id.* at 1024-25.

103. See, e.g., *Davenport*, 543 P.2d at 1207-08; *Born*, 633 P.2d at 1023-25; *Daygee v. State*, 514 P.2d 1159, 1167-68 (Alaska 1973). This statement refers only to those

attempts to reconcile the "inconsistent verdicts" with these facts and circumstances. In attempting to reconcile verdicts, the court examines the total picture, not just the facial consistency between verdicts. If this process discloses any facts or circumstances upon which the jury rationally could have based its conclusions, the verdict stands.¹⁰⁴

The Alaska Supreme Court reconciled seemingly inconsistent verdicts in *Davenport v. State*.¹⁰⁵ Davenport, whose liability depended on an accomplice theory, was charged with three counts of armed robbery. Each count related to the unlawful taking of different pieces of property during the commission of the robbery. The jury returned a conviction on counts one and two and an acquittal on count three. Despite the variance between the verdicts, the court believed that the jury acted rationally. An analysis of the record disclosed that while the state offered direct evidence with respect to the allegations contained in counts one and two, the state presented only circumstantial evidence to support the charges set forth in count three.¹⁰⁶ In the court's opinion, the variance between the verdicts coincided with the difference in the types of evidence presented by the state. Moreover, "there is nothing inconsistent about finding a defendant guilty of stealing one piece of property, but not another."¹⁰⁷

3. *Davis v. State: The Only Post-DeSacia Case with an Irreconcilable Inconsistency.* *Davis v. State*¹⁰⁸ is the only criminal case decided after *DeSacia* in which an Alaska appellate court has found an irreconcilable inconsistency between verdicts. All criminal charges in *Davis* arose out of a collision between an automobile operated by the defendant and a pickup truck operated by Albert Robertson. The prosecution alleged that the defendant's reckless operation of his motor vehicle caused the death of Edward Wilson, a passenger in the Robertson truck, and serious physical injury to Robertson. The jury convicted the defendant of criminally negligent homicide¹⁰⁹ with respect to Wilson and of reckless endangerment¹¹⁰ with respect to Robertson. The jury, however, acquitted Davis on the charge of second

cases in which Alaska courts have entertained an appeal on the grounds of verdict inconsistency. Cases such as *Roberts*, where the court declined to hear the defendant's objections, are excluded.

104. See *Davenport*, 543 P.2d at 1207-08.

105. 543 P.2d 1204 (Alaska 1975).

106. *Id.* at 1208.

107. *Id.*

108. 684 P.2d 147 (Alaska Ct. App. 1984).

109. *Davis*, 684 P.2d at 148; see ALASKA STAT. § 11.41.130 (1983).

110. *Davis*, 684 P.2d at 148; see ALASKA STAT. § 11.41.250 (1983).

degree assault¹¹¹ upon Robertson, as well as the lesser included offense of fourth degree assault¹¹² upon Robertson.

Faced with the above scenario, the court acknowledged that the defendant justifiably questioned the consistency of the verdicts. By finding the defendant guilty of negligent homicide and not guilty of assault, the jury had, in effect, indicated that the collision caused Wilson's death but not Robertson's injuries. After analyzing the elements of the crimes involved, the court concluded that the verdicts were irreconcilably inconsistent. Under Alaska law, fourth degree assault occurs when, with criminal negligence, one causes serious physical injury to another by means of a dangerous instrumentality.¹¹³ Criminally negligent homicide occurs when, with criminal negligence, one causes the death of another.¹¹⁴ By convicting the defendant on the homicide charge, the jury necessarily found that the defendant acted in a criminally negligent manner. In addition, "the jury must have found that the vehicle, used as it was, was capable of causing death or serious physical injury."¹¹⁵ The vehicle, therefore, constituted a dangerous instrument and the defendant's criminal negligence clearly caused the serious physical injury to Robertson.¹¹⁶ Because all elements necessary for a conviction of assault were present, the jury had acted irrationally in acquitting the defendant of assault.

This irreconcilable inconsistency did not, by itself, provide adequate grounds for reversal because the defendant had failed to make a timely objection to the verdicts at the trial level. The defendant would prevail only if the inconsistency met the obviousness standard articulated in *Roberts*.¹¹⁷ In the *Davis* court's view, "the verdicts, which reflect[ed] a conclusion that Davis caused Wilson's death but did not cause Robertson's injuries, [were] so obviously inconsistent that they satisf[ied] the plain error test."¹¹⁸ Davis, therefore, was entitled to relief despite his failure to object to the verdicts during trial. Uncertainty as to the extent of the jury's confusion led the court to grant relief in the form of a reversal and retrial of *both convictions*. The court felt that confusion could have infected the jury's determination

111. *Davis*, 684 P.2d at 149; see ALASKA STAT. § 11.41.210 (1983).

112. *Davis*, 684 P.2d at 149; see ALASKA STAT. § 11.41.230 (1983).

113. ALASKA STAT. § 11.41.230(2) (1983).

114. *Id.* § 11.41.130 (1983).

115. *Davis*, 684 P.2d at 149.

116. The discrepancy between verdicts could not rest on lack of injury because the evidence clearly proved that Robertson suffered serious physical injury in the accident.

117. *Davis*, 684 P.2d at 149-50. For a discussion of the obviousness standard, see *supra* notes 89-91 and accompanying text.

118. *Davis*, 684 P.2d at 150.

of the defendant's responsibility for the death of Wilson as well as for the injuries sustained by Robertson.¹¹⁹

IV. SHORTCOMINGS OF THE CURRENT ALASKA APPROACH TO INCONSISTENT JURY VERDICTS

A sound rationale underlies the *DeSacia* holding that strictly inconsistent verdicts may not stand. A number of other jurisdictions have espoused the view that requiring a minimal degree of rationality in the rendering of jury verdicts is quite reasonable.¹²⁰ As recognized in *DeSacia*, adherence to the federal rule calls for the application of questionable assumptions as to the jury's thought processes.¹²¹ Alaska justifiably refuses to engage in such speculation.

The justifiability of the basic premise of *DeSacia*, however, does not render Alaska's treatment of inconsistent verdicts completely acceptable. A careful examination of Alaska case law reveals a number of weaknesses in Alaska's current approach, including the following: (1) Alaska lacks reasonably clear standards for determining when jury verdicts reach the strictly inconsistent level; (2) reconciliation, a necessary corollary to the strictly inconsistent standard, is a cumbersome process that prevents the summary disposal of cases and increases the probability that Alaska courts will decide similar cases differently; (3) Alaska courts have failed adequately to define "obvious inconsistency"; and (4) Alaska's position on the applicability of collateral estoppel in cases such as *DeSacia* arguably violates the federal Constitution.

Lack of reasonably clear standards for determining whether jury verdicts are strictly inconsistent constitutes a significant shortcoming in Alaska's current approach to verdict inconsistency. The only guidance for litigants comes from the frequently repeated assertion that verdicts subject to reconciliation fail to qualify as "strictly inconsistent." Important questions remain as to how strained the reconciliation may be. The lack of guidance increases the potential for excessive, unwarranted appeals on the basis of verdict inconsistency.

If Alaska courts had narrowly construed the *DeSacia* opinion, much of the uncertainty surrounding the definition of "strictly inconsistent" would not exist. *DeSacia* can be read as holding that a verdict

119. *Id.* Permitting a retrial of both convictions does not appear to violate the constitutions of the United States or Alaska. In fact, the disposition of this case favored the defendant.

120. See *supra* note 9.

121. *DeSacia v. State*, 469 P.2d 369, 376-77 (Alaska 1970); see *supra* text accompanying notes 55-57.

reaches the "strictly inconsistent" level only when both of the following conditions exist: (1) the elements of the crimes charged are identical,¹²² and (2) the evidence bearing on the elements of the crimes charged is identical for each of the alleged inconsistent verdicts.¹²³ This interpretation establishes a threshold requirement that the elements of the crimes charged be identical. The court need conduct further analysis only after finding that the case satisfies this easily discernible requirement.

Reconciliation is a necessary corollary to Alaska's use of the strictly inconsistent standard. Under current law, the court must conduct a thorough analysis of the facts and circumstances of each case in order to determine whether they are reconcilable with the apparently inconsistent verdicts. This cumbersome process delays the disposition of cases warranting summary disposal and increases the probability that similar cases will be decided differently. Adoption of a more workable definition of strictly inconsistent would alleviate these problems.

Alaska courts have also failed to particularize the factors that make a verdict obviously inconsistent. This failure, in conjunction with the absence of a workable definition for "strictly inconsistent," renders attempts to distinguish between a strict inconsistency and an obvious inconsistency tenuous at best. This distinction assumes critical significance for litigants who fail to make a timely objection to inconsistencies at the trial level.

Permitting a retrial of the reversed conviction represents another troublesome aspect of the current Alaska approach. Because this topic has been extensively covered in a prior note, little discussion will be included here.¹²⁴ Alaska's current practice of permitting retrials of convictions reversed on grounds of inconsistency may violate the double jeopardy clause of the federal Constitution. The United States Supreme Court has held that the guarantee against double jeopardy embodies collateral estoppel and therefore precludes a retrial when the

122. See *DeSacia*, 469 P.2d at 374 ("It is obvious that the two counts of the indictment in this case charged DeSacia with identical conduct and with the same element of negligence. They differed only in that a different person was named as the victim in each instance.").

123. See *id.* (evidence differed only as to medical cause of death which court considered irrelevant).

A final condition, not explicitly recognized in *DeSacia* but automatically required in all cases, is that the evidence in the record must sufficiently support a finding of guilt. If this threshold requirement is not met, the conviction can be reversed for insufficient evidence and the issue of inconsistency need never arise.

124. Case Comment, *Inconsistent Verdicts in a Criminal Case: A Comment on DeSacia v. State*, 9 ALASKA L.J. 130 (May 1971).

retrial would involve the litigation of issues decided by a prior acquittal.¹²⁵ The *DeSacia* court permitted the state to retry the defendant after the reversal of his conviction despite the fact that the second trial would relitigate issues encompassed in the defendant's prior acquittal.¹²⁶ The court explained that a contrary rule would be unfair to the state.¹²⁷ This rule, however, fails to recognize the supremacy of the federal Constitution.

The *DeSacia* court also arguably distorted the holding in *Ashe v. Swenson*,¹²⁸ one of the few cases allegedly supporting the fairness approach to the application of collateral estoppel, by using a quote from *Ashe* out of context. The *Ashe* quote stated, in pertinent part, that "collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."¹²⁹ Immediately after making this admonition, however, the *Ashe* Court noted that the relevant inquiry was "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."¹³⁰ By the *DeSacia* court's own admission, the issues in both counts of the *DeSacia* indictment were identical.¹³¹ Thus, the jury necessarily grounded its verdict of acquittal upon an issue that the defendant sought to foreclose from appeal and collateral estoppel should have been held to preclude a retrial.

V. SUGGESTIONS FOR REFORM

As the above discussion illustrates, Alaska needs to clarify its position with respect to inconsistent jury verdicts. Alaska courts, as well as litigants, would benefit from the introduction of clear guidelines. To this end, Alaska should adopt one of two alternative approaches.

The first alternative calls for the Alaska Supreme Court to declare that it will narrowly construe the *DeSacia* holding, especially the strictly inconsistent standard. When next presented with the issue of verdict inconsistency, the Alaska Supreme Court should stress the continuing validity of the *DeSacia* opinion and hold that the case stands for the proposition that verdicts reach the strictly inconsistent level only when both of the following conditions are met: (1) the elements of the crimes charged are identical, and (2) the evidence bearing

125. *Ashe v. Swenson*, 397 U.S. 436, 443-46 (1970).

126. *DeSacia*, 469 P.2d at 379-82.

127. For a discussion of the *DeSacia* fairness rationale, see *supra* text accompanying notes 79-80.

128. 397 U.S. 436 (1970).

129. *Id.* at 444; see *supra* text accompanying notes 76-78.

130. *Ashe*, 397 U.S. at 444.

131. 469 P.2d at 373-74.

on the elements of the crimes charged is identical for each of the alleged inconsistent verdicts.¹³²

The second alternative provides for the legislative enactment of a provision similar to section 954 of the California Penal Code.¹³³ In effect, the Alaska legislature should provide that an acquittal on one or more counts does not constitute an acquittal on any other count. Accordingly, where the weight of the evidence supports a conviction, a guilty verdict stands despite the existence of an apparently inconsistent verdict of acquittal. The Alaska legislature should also adopt an important exception to this general proposition. Inconsistency should invalidate a conviction where both of the following conditions are met:

[All] of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted, and proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of which the defendant was found guilty.¹³⁴

Both alternatives provide precise and workable guidelines for determining when inconsistency affords the reversal of a conviction and lower the risk that similar cases will be decided differently. Both approaches also eliminate the inherent difficulties in identifying an "obvious" inconsistency for purposes of determining whether an appellate court should hear the appeal of a defendant who failed timely to object to verdict inconsistency. Only "obvious" inconsistencies merit attention under the alternatives. That is, only those inconsistencies apparent on the face of the record by examining the elements of the crimes charged may be reversed.

For reasons previously discussed, under either suggested approach Alaska courts should hold that collateral estoppel precludes a retrial on convictions overturned because of verdict inconsistency.¹³⁵ Both alternatives permit the invalidation of a conviction only where

132. See *supra* notes 122-23 and accompanying text. Such a holding will directly conflict with the decision of the Alaska Court of Appeals in *Roberts*. It does not appear, however, that this new position will directly conflict with any Alaska Supreme Court decision rendered since *DeSacia*.

If the first condition is viewed as too restrictive, a slight modification could be made. The Alaska Supreme Court could hold that verdicts reach the strictly inconsistent level only when the second condition is met and "all of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted." *People v. Hamilton*, 80 Cal. App. 3d 124, 130, 145 Cal. Rptr. 429, 432 (1978). An analysis of the case law suggests that Alaska courts may, in fact, have implicitly adopted such a standard. Unless this standard is explicitly stated, however, the shortcomings of Alaska's current approach will continue to plague this area of the law.

133. See *supra* notes 39-41 and accompanying text.

134. *Hamilton*, 80 Cal. App. 3d at 130, 145 Cal. Rptr. at 432.

135. See *supra* notes 125-31 and accompanying text.

the elements of the crimes charged are identical. At retrial, therefore, the state would have to relitigate issues decided by the prior acquittal.

VI. CONCLUSION

Alaska has justifiably chosen to adhere to the principle that strictly inconsistent verdicts may not stand. Now that this basic premise has gained widespread acceptance in the state, Alaska needs to eliminate the ambiguities and deficiencies that continue to plague this area of the law. To this end, Alaska should adopt one of the following two approaches: (1) the Alaska Supreme Court should narrowly construe the *DeSacia* holding, or (2) the Alaska legislature should enact a statute that parallels the California approach to verdict inconsistency. Adoption of either of these alternatives would permit Alaska to adhere to the principle that strictly inconsistent verdicts may not stand, while providing a workable framework for the application of that principle to specific cases.

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