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The Government's Right to Appeal in Criminal Cases - A Procedural Question

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The Government's Right to Appeal in Criminal Cases—A Procedural Question

The use of the double jeopardy clause to bar appeal by the government in criminal cases has recently come under close scrutiny by the United States Supreme Court. An ostensible shift in rationale by the Court concerning the application of the double jeopardy clause is examined, using as a background, cases which have reached the Court in varying procedural stages. The current shift in the rationale away from a concern for multiple trials and toward trial court determinations of culpability before the double jeopardy comes into play, may place too great an emphasis on when a procedural "acquittal" is entered. Thus, the author concludes, the once expansive protection provided by the double jeopardy clause may be limited by procedural concerns.

It has long been a rule of law that the federal government may not take appeal in a criminal case without express statutory authority.[1] Early statutory authority, however, provided the government with little help. In *United States v. Sanges*,[2] the Court held that general provisions of the Judiciary Act of 1891,[3] were not sufficiently explicit to overcome the common-law rule that "the State could not sue out a writ of error in a criminal case unless the legislature had expressly granted it that right."[4] In 1907, Congress passed the first Criminal Appeals Act providing for appeals by the government in limited circumstances.[5]

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1. In United States v. Sanges, 144 U.S. 310, 312-13 (1892), the Supreme Court sets forth the rule that the government may not take appeal in a criminal case without statutory authority.

> But whatever may have been, or may be, the law of England . . . it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes. . . .

Id. at 312.

2. 144 U.S. 310 (1892).

3. The Judiciary Act of 1891, ch. 517, § 5, 26 Stat. 827, 828 (1891), provided, in part, as follows "That appeals or writs of error may be taken . . . direct to the Supreme Court in the following cases: . . . From the final sentences and decrees in prize causes. In cases of conviction of a capital or otherwise infamous crime."

4. United States v. Sanges, 144 U.S. 310, 322-23 (1892) (quoting United States v. Wilson, 420 U.S. 332, 336-37 (1975)).

5. The Criminal Appeals Act, Pub. L. No. 223, 34 Stat. 1246 (1907), provided, in part, as follows:

> That a writ of error may be taken by and on behalf of the United States . . . in the following instances, to wit:
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> . . . .

Though the Act was amended several times to increase the ability of the government to appeal in criminal cases, the Act had a very limited effect.[6] The Court continued to construe the Act in a technical manner in accordance with the common-law meaning of the terms employed and thus limited the ability of the government to appeal.[7] Finally, after years of dealing with the 1907 Act and its amendments, the Court concluded that the Act was "a failure . . . a most unruly child that had not improved with age."[8]

In 1971, Congress adopted a Criminal Appeals Act intending to broaden the government's right to appeal in criminal cases.[9] The legislative history of this Act reveals that Congress intended to permit the government to appeal any decision or order terminating a prosecution except where appeal would violate the double jeopardy provision of the United States Constitution.[10] Congress directed that all statutory barriers to government appeals be removed and that only the Constitution should limit the government's right to appeal in a criminal case.[11] Thus, in the area of

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From a decision or judgment quashing . . . any indictment . . . or construction of the statute upon which the indictment is founded.

. . . .

From the . . . judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

6. United States v. Wilson, 420 U.S. 332 (1975).

The statute was amended several times, but the amendments did not render its construction any simpler. The most significant change in the statute was the 1942 amendment, 56 Stat. 271, . . . provided that some dismissals should be reviewed in the courts of appeal . . . [I]n 1968, the statute was further amended to authorize Government appeals from pretrial rulings granting motions to suppress or to return seized property.

Id. at 337 n.3.

7. *See* United States v. Wilson, 420 U.S. 332, 337 (1975). In *Wilson*, the Court sets forth the history and difficulties associated with the various Criminal Appeals Acts.

8. United States v. Sisson, 399 U.S. 267, 307 (1970).

9. Omnibus Crime Control Act of 1970, 18 U.S.C. § 3731 (1976) provides in part: appeal is authorized "from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

10. [1970] U.S. Code Cong. and Ad. News 5804, 5848-49, which provides "that an appeal by the United States shall lie to a court of appeals from a decision, judgment . . . of a district court dismissing an indictment . . . but that no appeal shall lie in any case in which the Double Jeopardy Clause . . . prohibits further prosecution."

11. United States v. Wilson, 420 U.S. 332, 337 (1975). In *Wilson* the Court notes that the Conference Committee, which was working on what was to be the Criminal Appeals Act of 1970, desired to authorize appeals whenever constitutionally permissible, but it should be the task of the Courts to define the constitutional boundaries. Thus, the statute does not list specific circumstances that would permit governmental appeal.

See S. REP. NO. 1296, 91st Cong., 1st Sess. 18 (1970). The Senate report indicates that the Judiciary Committee intended to extend the government's right to appeal in criminal cases to the constitutional limit.

appeals by the government in criminal cases the question, for the first time, became one of how the double jeopardy clause of the fifth amendment should be applied.

DOUBLE JEOPARDY LIMITATIONS

In the 17th century, Lord Coke described the protection afforded by the principle of double jeopardy as a function of three related common-law pleas: *autrefois acquit, autrefois convict*, and pardon.[12] Blackstone went further in writing that the jeopardy principle underlying the first two pleas was a, "universal maxim of the common law of England, . . . no man is to be brought into jeopardy of his life more than once for the same offence."[13] In the United States the case of *United States v. Ball*,[14] addressed the issue of double jeopardy. In *Ball*, the Court held that a defendant who is found guilty and then successfully sets aside that verdict, may be retried without running afoul of the Constitution. However, the government is bound by a verdict of acquittal and cannot appeal.[15] Thus, determining what constitutes an acquittal becomes the key to determining when the double jeopardy clause will bar appeal by the government.

CASE ANALYSIS

The question of when a defendant will be twice placed in jeopardy arises in several procedural situations. To wit: pretrial dismissal or acquittal,[16] post-trial dismissal or acquittal,[17] mistrial,[18]

12. United States v. Wilson, 420 U.S. at 340. *See* Wurzburg, *Double Jeopardy: Dismissal and Government Appeal*, 13 GONZ. L. REV. 337 (1978). The pleas are prior acquittal and pardon.

13. United States v. Wilson, 420 U.S. at 340.

14. 163 U.S. 662 (1895).

15. *See* United States v. Jorn, 400 U.S. 470 (1971). In *Jorn*, the Court espouses the multiple trial rationale for allowing the double jeopardy clause to bar appeal. "A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protection which the Constitution establishes. . . ." *Id.* at 479.

16. *See* Serfass v. United States, 420 U.S. 377 (1975). Defendant prevailed on a pretrial motion to dismiss his indictment for willfull failure to report for and submit to induction into the armed forces. The government sought to appeal one count and was allowed to do so.

17. *See* United States v. Wilson, 420 U.S. 332, 337 (1975). Defendant won post-trial motion to dismiss indictment following a guilty verdict entered by the jury for the charge of converting union funds to defendant's own use in violation of Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(c) (1976). The government sought to appeal.

and midtrial dismissal or acquittal.[19] The major focus of this article is on the area of midtrial dismissals or acquittals, for it is this area that has felt the most turbulence from recent Supreme Court decisions.[20]

Two distinct rationales have been espoused by the Supreme Court to support the double jeopardy clause limitations on the government in taking appeal in criminal cases. These separate rationales have led to the present controversy and confusion in the case of *United States v. Scott*.[21] Of the nine justices on the Court, six appear to have taken a definite stand on the question of how the clause is to be applied. Three justices support the rationale that the purpose of the double-jeopardy clause is to protect the defendant from the burden of multiple trials.[22] By following this rationale, the Court is, in fact, saying that the clause protects an individual by limiting the government to a single criminal proceeding, recognizing society's understanding of the gross unfairness of requiring the accused to undergo the strain and the agony of more than one trial for a single offense.[23] Three justices support the rationale that the purpose of the double-jeopardy clause is to preserve judgments of culpability.[24] Though prevention of multiple trials is important, it is not controlling. The purpose of the double jeopardy clause, according to this view, is to protect final judgments and thus it should not bar retrial where proceedings are terminated on a "basis unrelated to factual guilt or innocence of the offense of which he is accused."[25]

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18. *See* Arizona v. Washington, 434 U.S. 497 (1978); Illinois v. Sommerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); standing for the proposition that an appeal of a mistrial order will only lie where the trial judge bases his order upon a finding of "manifest necessity." *See* note 38, *infra*, and accompanying text.

19. United States v. Scott, 437 U.S. 82 (1978). Defendant's motion for dismissal as to two counts of an indictment for illegal distribution of various narcotics was granted. The government sought to appeal one count.

20. *Id. See generally The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 111-14 (1978).

21. 437 U.S. 82 (1978). *Scott* dealt with the question of the appealability of a district court order dismissing one count of an indictment before the conclusion of a trial. The Court set forth two rationales used in deciding when the double jeopardy clause has been violated. The majority opinion supported a trial court determination of culpability before the issue of double jeopardy will arise. The minority opinion supports a multiple trial rationale, requiring the appellate court to consider whether further trial is necessary following appeal, before the issue of double jeopardy will arise.

22. Justices Brennan, White, and Marshall.

23. *See* United States v. Jorn, 400 U.S. 479 (1971).

24. Chief Justice Burger; Justices Rehnquist and Powell. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 109 (1978).

25. United States v. Scott, 437 U.S. 82, 98-99 (1978). *See* note 55, *infra*.

POST-TRIAL ACQUITTALS OR DISMISSALS

The Court faced the question of which rationale would control in *United States v. Wilson*.[26] In *Wilson*, the jury had entered a verdict of guilty against the defendant, but the judge dismissed the indictment for prejudicial pre-indictment delay. The Third Circuit Court of Appeals dismissed the government's appeal on the ground that the appeal was barred by the double jeopardy clause. On rehearing the court of appeals went further, stating that the district court's ruling was, in fact, an acquittal.[27] The Supreme Court held that the government may appeal in cases presenting this type of factual situation. The Court reasoned that the appeal would not result in a new trial or subject the defendant to the harassment of multiple prosecutions because the appellate court will either affirm the trial court or find the trial court in error and reinstate the jury's finding of guilty.[28]

This same rationale was followed in *United States v. Jenkins*,[29] a case which was heard the same day as *Wilson*. In *Jenkins*, the defendant was charged with failing to submit to induction into the armed forces of the United States. The case was tried to the court and following the end of the trial the district court "dismissed" the indictment.[30] The government sought appeal under the Omnibus Crime Control Act of 1970.[31] The Second Circuit Court of Appeals dismissed the appeal claiming lack of jurisdiction on the grounds that the double jeopardy clause barred further prosecution. The Supreme Court began its review by stating that the fifth amendment does not distinguish between bench and jury, thus, the clause applies with equal force to both. However in this case, the Court noted, *Wilson* is not controlling. The trial court in *Jenkins* filed findings of fact and conclusions of law, but made *no* determination as to guilt. Thus, though the Court could not say with certainty whether or not the trial court's ruling was a resolution of the factual issues against the government, *i.e.*, a finding as to culpability, the Court could say that further proceedings of some

26. 420 U.S. 332 (1975).
27. *Id.* at 335. The circuit court reasoned that since the district court had relied on facts brought out at trial in reaching its finding of prejudice from the pre-indictment delay, the circuit court's ruling was, in effect, an acquittal. Thus, the government could not constitutionally appeal the acquittal.
28. *Id.* at 352.
29. 420 U.S. 358 (1975).
30. *Id.* at 359.
31. *See* note 9, *supra*.

sort, devoted to the resolution of factual issues going to the elements of the offense charged, would be required upon reversal and remand. Therefore, the Court affirmed the holding of the appellate court.[32] In affirming the Second Circuit Court, the Supreme Court relied upon the rationale that the individual should only face the ordeal, expense, anxiety, and insecurity of trial once, regardless of culpability.[33] Based upon *Wilson* and *Jenkins*, it appears safe to state that in post-trial acquittals the rationale that the double jeopardy clause was intended to prevent multiple trial controls. Thus, if an appeal of a post-trial acquittal will result in further proceedings, the appeal will not be allowed.

MISTRIAL

The question of appeal in mistrial cases presents a unique problem to the government. This problem results from the rule that before the double jeopardy clause may bar appeal, jeopardy must have first attached. "The protections afforded by the clause are implicated only when the accused has actually been placed in jeopardy."[34] Jeopardy attaches only when the defendant has been "put to trial before the trier of the facts, whether the trier be a jury or a judge."[35] Thus, if the dismissal takes place before jeopardy attaches, *i.e.*, pretrial, then the order is appealable.[36] However, some cases have held that an appeal is not allowed from a pretrial dismissal which resolves facts in favor of the defendant.[37]

This area is further complicated by the rule that in cases of mistrial a finding of "manifest necessity" will bar any double jeop-

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

33. *Id.* at 370. The Court, relying on Green v. United States, 355 U.S. 184 (1957), noted that even if the trial court was to receive no additional evidence, it would still be necessary for it to make supplemental findings and thus some form of further proceeding would result from the appeal.

34. Serfass v. United States, 420 U.S. 377 (1975).

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

36. Serfass v. United States, 420 U.S. 377 (1975). In *Serfass*, the defendant was granted a pretrial motion of dismissal, the government sought to appeal, and the Supreme Court granted the appeal. In granting the appeal the Court noted that the word acquittal has "no significance in this context unless jeopardy has once attached and an accused has been subject to the risk of conviction." *Id.* at 392. *See also* United States v. Marion, 404 U.S. 307 (1971). Order dismissing indictment for lack of speedy trial directly appealable to Supreme Court. *Id.* at 311-12.

37. *See* United States v. Ponto, 454 F.2d 657 (7th Cir. 1971) (*en banc*), *aff'g*, 454 F.2d 647 (7th Cir. 1971). In *Ponto* the trial judge dismissed an indictment for refusal to submit to induction after pretrial hearings. The Seventh Circuit held the dismissal not to be reviewable, reasoning that the trial court had found the defendant improperly classified and, therefore, acquitted the defendant on the merits. *See* United States v. Hill, 473 F.2d 759 (9th Cir. 1972). Refusal to hear appeal on trial court dismissal of indictment for obscenity after pretrial examination.

ardy claim.[38] Thus, the cases hold that the accused may be retried.[39] This retrial is based upon the concept that a mistrial ruling invariably rests upon grounds consistent with reprosecution and that the mistrial order does not contemplate an end to all prosecution of the defendant for the offense charged.[40]

The Supreme Court faced the question of "manifest necessity" in *United States v. Jorn*.[41] In *Jorn*, the defendant was charged with willfully assisting in the preparation of fraudulent income tax returns. The judge declared a mistrial upon learning, following the impaneling of the jury, that the prosecution was going to use as witnesses the same taxpayers for whom the defendant allegedly prepared returns. The judge, feeling that warnings given as to the witnesses' constitutional rights were not adequate, discharged the jury and aborted the trial. The case was set for a second trial; however, upon a pretrial motion, the information was dismissed on the grounds of former jeopardy. The government sought direct appeal to the Supreme Court under the Omnibus Crime Control Act of 1970.[42] The Supreme Court noted that the double jeopardy clause will bar retrial of a mistrial case where "bad-faith conduct by a judge or prosecutor . . . threatens the [h]arassment [sic] of an accused by successive prosecutions or declaration of mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant."[43] This was not the case in *Jorn* where the trial judge acted upon his own motion. Thus, the question was one of manifest necessity or abuse of discretion. The Supreme Court held that the trial judge had abused his discretion in discharging the jury. The Court relied upon the rationale that the defendant had an interest in deciding to take the case from the jury. The defendant did not act here; thus, re-

38. Arizona v. Washington, 434 U.S. 497 (1978). The Court required an implicit, if not explicit, finding of "manifest necessity" to justify the exercise of discretion by the trial judge in ordering a mistrial. *See* note 18, *supra*.

39. Thompson v. United States, 155 U.S. 271 (1894) (reprosecution not barred where jury discharged because juror had served on grand jury indicting defendant); Simmons v. United States, 142 U.S. 148 (1891) (reprosecution not barred where mistrial declared because letter published in newspaper rendered juror's impartiality doubtful).

40. United States v. Jorn, 400 U.S. 470, 476 (1971).

41. 400 U.S. 470 (1971).

42. *See* note 9, *supra*.

43. United States v. Jorn, 400 U.S. 470 (1971). *See also* United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976), holding that over-reaching by prosecutor allows a bar to appeal.

prosecution subjected the defendant to personal strain and insecurity. Therefore, the Court concluded, any retrial of this case would violate the double jeopardy clause.[44]

Justice Stewart wrote the dissenting opinion in *Jorn*, and in it he supported the rationale that the double jeopardy clause was intended to protect findings of culpability. "The real question is whether there has been an 'abuse' of the trial process resulting in prejudice to the accused . . . such as to outweigh society's interest in the punishment of crime."[45]

This dichotomy of rationales reached the Court again in *United States v. Martin Linen Supply Company*.[46] In *Martin*, the government moved to enforce a consent decree. The case was tried to a jury which became "hopelessly deadlocked" and the judge discharged it. Pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, the defendant made a timely motion for judgment of acquittal and the district court granted the motion.[47] The government appealed pursuant to the Omnibus Crime Control Act of 1970 and the Supreme Court affirmed the Fifth Circuit ruling that the appeal was barred by the double jeopardy clause of the fifth amendment.[48] Justice Brennan, writing for the majority relied upon the rationale that the double jeopardy clause was intended to prevent multiple trials. The clause, according to this rationale, was intended to guarantee that "the state shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to . . . expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . enhancing the possibility that even though innocent he may be found guilty.' "[49] The Court went on to conclude that a valid judgment of acquittal had been entered and that any further appeal would necessitate another trial or further proceedings of some sort, devoted to the

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44. 400 U.S. at 486. The Court noted, in support of their finding of abuse of discretion, that the trial judge had not considered a continuance. Indeed "the trial judge acted so abruptly in discharging the jury that, had the prosecution been disposed to suggest a continuance . . . there would have been no opportunity to do so." *Id.* at 487.

45. *Id.* at 492.

46. 430 U.S. 564 (1977). In *Martin*, the company accepted a consent decree following a suit for violation of the Sherman Act, in restraint of trade. The company was sued again by the government for contempt of the consent decree.

47. FED. R. CRIM. P. 29 provides in part:

> (c) *Motion After Discharge of Jury.* If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged. . . . If no verdict is returned, the court may enter judgment of acquittal. . . .

48. *See* United States v. Martin Linen Supply Company, 430 U.S. 564, 576 (1977). *See also*, note 9 *supra*.

49. *Id.* at 569.

resolution of factual issues going to the elements of the offense.[50] The majority in *Martin* succeeded in expanding the definition of acquittal to include acquittals entered pursuant to Federal Rules of Criminal Procedure 29(c).

Chief Justice Burger, in his dissenting opinion, argued for the rationale that the clause applies only to the protection of findings of culpability. The fact that the order is phrased as an acquittal rather than a dismissal, should not be dispositive, claimed Chief Justice Burger.[51] The key ultimately is whether or not the defendant has been "acquitted." "In ruling on a motion for acquittal the District Judge must pass on the sufficiency, *not* on the weight, of the Government's case."[52] That is, following *Martin*, the court should "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[53]

One distinct problem arose as a result of *Martin*. Because the jury reached no guilty verdict in *Martin*, the *Wilson* and *Jenkins* situation did not arise. Should a Rule 29(c) acquittal follow a jury verdict of guilty, *Wilson* and *Jenkins* would allow appeal of the acquittal because no further proceedings on the merits would be required if the government were successful on appeal. However, under *Martin*, a Rule 29(c) acquittal should be nonappealable.[54] How the Court will resolve this is not yet clear.

MIDTRIAL ACQUITTALS OR DISMISSALS

In *United States v. Scott*[55] the Court upset a fairly consistent pattern of dealing with the issue of when a governmental appeal violates the double jeopardy clause.[56] *Scott* appears to change the rationale of the double jeopardy clause, in cases of midtrial

50. *Id.* at 575-76.

51. *Id.* at 582. Chief Justice Burger also argued that once the jury was dismissed, the defendant is no longer in jeopardy in that proceeding, thus the defendant may be reprosecuted without running afoul of the double jeopardy clause. *Id.* at 581-582.

52. *Id.* at 582.

53. *Id.* at 571.

54. Note, *Constitutional Law - Fifth Amendment - Double Jeopardy - The Double Jeopardy Clause Bars Appellate Review Following A Judgment of Acquittal Entered Under Federal Rule of Criminal Procedure 29(c)*, 46 U. CIN. L. REV. 1055, 1060-61 (1978).

55. 437 U.S. 82 (1978). *See also* note 21, *supra*.

56. Until the *Scott* decision, the Court primarily concentrated on the avoidance of multiple trials in deciding the propriety of government appeals in criminal

dismissals, from that of shielding defendants against the burden of multiple trials to that of preserving determinations of culpability.[57]

Until *Scott*, the consistent pattern of analysis utilized a three step determination. The court must determine: (1) has jeopardy attached; (2) would a government appeal present a threat of successive prosecutions; and, (3) is the dismissal, in fact, a mistrial based upon manifest necessity.[58]

In *Scott*, the government's appeal of a district court order dismissing two counts of an indictment for federal drug offenses because of prejudicial pre-indictment delay was dismissed by the Sixth Circuit Court of Appeals. The circuit court, relying upon *Jenkins*, concluded that further prosecution was barred by the double jeopardy clause, because "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand."[59] The Supreme Court reversed the circuit court and remanded the case for further proceedings. The Court began its analysis by stating that the circuit court's reliance upon *Jenkins*, was correct, viewed from past precedents.[60] However the Court, speaking through Justice Rehnquist, reasoned that in the past it had placed "an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled . . . where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence."[61] The Court then overruled *Jenkins*.[62] The majority's concern with the double jeopardy clause only affecting a judg-

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cases. Now the Court's reaction in double jeopardy questions is unpredictable. *See* note 80, *infra*.

57. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57 (1978). This shift in focus is illustrated by the difference in treatment given by the majority and the dissenters in *Scott; accord*, Fong Foo v. United States, 369 U.S. 141 (1962). In *Fong Foo*:

> [T]he court held that a defendant could not be retried following an acquittal, even if the acquital were clearly erroneous. Justice Brennan insisted that *Fong Foo* . . . went beyond protecting determinations of innocence, and protected the defendant from the burden of retrial. . . . However, for Justice Rehnquist, *Fong Foo*, reflected the particular significance the law attaches to acquittal and suggested that the Court prevented appeal after any acquittal because retrial might increase the odds of convicting an innocent defendant (citations omitted).

See The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 112 n.28 (1978).

58. *See* Lee v. United States, 432 U.S. 23, 30 (1977). The Court held that an order of dismissing the information "functionally indistinguishable from a declaration of mistrial." *Id.* at 31. Thus, the government's appeal was not barred by the double jeopardy clause.

59. United States v. Scott, 437 U.S. at 86.

60. *Id.* at 84.

61. *Id.* at 87.

62. *Id.* at 86-87.

ment of acquittal appeared to be the impetus behind the Court's action in addressing the concern of those who support the multiple trials rationale, the Court stated:

> This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment not because . . . the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.[63]

The Court then distinguished *United States v. Martin Linen Supply Company*,[64] by stating that the district court in *Martin* had examined the evidence and determined it legally insufficient to sustain a conviction.[65] In *Scott*, the majority reasoned, the dismissal of an indictment for pre-indictment delay represented a legal judgment that the defendant, although criminally culpable, may not be punished because of a supposed constitutional violation. The Court was careful to emphasize that its findings were not based upon waiver, rather, the Court appeared to base its holding in part on the fact that the defendant deliberately chose to seek termination of the proceedings on a basis unrelated to factual guilt or innocence. In so doing, the Court concluded, the double jeopardy clause does not relieve a defendant from the consequences of his voluntary choice.[66] The basic rationale used by the majority was a concern for findings of culpability. The defendant "has not been deprived of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' "[67]

In his dissent, Justice Brennan objected that under the prior laws the dismissal would have been treated as an "acquittal" *i.e.*, a legal determination on the basis of facts adduced at the trial relating to the general issue of the case.[68] Even if it does not amount to an acquittal, claimed Justice Brennan, no appeal by the government can lie where further proceedings of some sort devoted to resolution of factual issues are required. Also, if a dis-

63. *Id.* at 96.
64. 430 U.S. 564 (1977).
65. United States v. Scott, 437 U.S. at 97.
66. *Id.* at 98-99.
67. *Id.* at 100 (quoting Arizona v. Washington, 434 U.S. 497, 509 (1978)).
68. United States v. Scott, 437 U.S. at 102.

missal is premised on the fact that the defendant simply cannot be convicted of the offense charged, the government cannot appeal.[69] The majority attacked both of the latter quasi-acquittals mentioned above by overruling *Jenkins* and stating that an appeal is not barred simply because a dismissal " 'is granted on the ground . . . that the defendant simply cannot be convicted . . . .' "[70]

The principal difficulty with the Court's holding in *Scott* is that in redirecting the focus of the double jeopardy clause the Court has further confused an already ambiguous area. However, it appears the holding in *Scott* is limited to midtrial dismissals. This follows from the Court's emphasis in *Crist v. Bretz*,[71] also heard during the 1977 term. The Court in *Crist* emphasized that the reason double jeopardy attaches when the jury is sworn is to protect the defendant from the burden of multiple trials.[72] Thus, the Court reasserted its support for the multiple trial rationale that has led to a fairly consistent treatment of cases. Also during the 1977 term, the Court in *Arizona v. Washington*,[73] reasserted that the restrictions placed upon a trial judge's decision to grant a mistrial are designed to protect the defendant from the pains that accompany multiple trials.[74] "The Court's previous decision that a judge's post-verdict dismissal can be appealed — since reversal would not require additional trials — appears to remain good law."[75] However, the appealability of a Rule 29(c) acquittal by the district judge following a jury finding of guilty remains an unanswered question.

CONCLUSION

A pattern of past decisions in certain types of cases begins to emerge, though upset by the decisions in *Scott*, from which some guidance as to how the Court may rule on future government appeals may be discerned.

(1) A mistrial declared over the objection of the defendant will be subjected to scrutiny under the "manifest necessity" standard. Should this standard not be met, the trial court's order of mistrial

69. *Id.*

70. *Id.* at 97 (quoting Lee v. United States, 432 U.S. 23, 30 (1977)).

71. 437 U.S. 28 (1978).

72. *Id.* at 34-35. In *Crist*, the Court relied upon Green v. United States, 355 U.S. 184, 187-88 (1957). Though *Green* was decided prior to the Criminal Appeals Act of 1970 (*see* note 8, *supra*), the Court in *Crist* concluded that the rationale of invoking the double jeopardy clause to prevent multiple trials, which was used in *Green*, was applicable to criminal cases following the 1970 Act.

73. 434 U.S. 497 (1978). *See* note 9, *supra*.

74. *Id.* at 508-11.

75. 92 HARV. L. REV. 57, 113 (1978).

is improper and the defendant may not be retried.[76]

(2) The government may appeal a pretrial order dismissing the indictment and discharging the defendant. A dismissal entered at this stage is not a ruling on the merits and jeopardy has not attached.[77]

(3) The government may appeal post-verdict ruling by the trial court if entered after a general finding of guilt by the fact finder.[78]

(4) The double jeopardy clause protects the defendant only in cases of determinations of innocence in midtrial dismissals.[79]

In cases of midtrial dismissals, the rule set forth in *Scott* may ultimately lead to more confusion than clarity. Following *Scott*, a dismissal on the grounds of pre-indictment delay, which is not an adjudication of innocence, appears to be appealable. However, a dismissal based upon the defense of entrapment or insanity constitutes an acquittal which is nonappealable. The majority's explanation that these defenses are based upon "factual judgments" whereas dismissals of indictment for pre-indictment delay are "legal judgments" is hard to follow. All defenses, after all, require the application of legal principles to facts adduced at trial. It is difficult to tell how the Court will deal with this distinction in the future. The government must, therefore, place particular emphasis on the argument that there has been no adjudication of innocence in cases involving affirmative defenses.

There is also the question of whether or not *Scott* would apply to cases where the defendant did not request the dismissal. The Court in *Scott*, did not appear to rely entirely upon the fact that the defendant made the request in reaching its decision. However, the Court did state that when the defendant asks for a dismissal "[n]o interest protected by the Double Jeopardy Clause is invaded" by a possible retrial.[80]

In other areas of dismissals, unlike midtrial, the Court's consistent emphasis on avoidance of multiple trials, through the use of the double jeopardy clause, has resulted in a fairly consistent pat-

76. Arizona v. Washington, 434 U.S. 497 (1978); United States v. Perez, 23 U.S. (9 Wheat.) 579 (1824).
77. Serfass v. United States, 420 U.S. 377 (1975).
78. United States v. Wilson, 420 U.S. 332 (1975).
79. United States v. Scott, 437 U.S. 82 (1978).
80. *Id.* at 100.

tern.[81] However, by redirecting the purpose of the double jeopardy clause to protect only findings of culpability in the area of mistrial dismissals, the Court has caused unnecessary uncertainty. How the *Scott* decision will affect other procedural areas such as post-trial dismissals or pre-trial dismissals has yet to be shown. Thus, it would behoove attorneys who are faced with a possible appeal by the government in criminal cases to keep in mind the apparent shift in rationale by the Court as is shown by the *Scott* decision.

In the end, perhaps the only guidance that is available following the *Scott* decision is that "the double jeopardy clause protects the defendant against the burden of multiple trials, *except* in the case of midtrial dismissals when the clause only protects determinations of innocence, *at least* when the defendant requests dismissal."[82]

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81. This pattern reveals a consistent concern for the avoidance of possible multiple trials by use of the double jeopardy clause in the following cases: Arizona v. Washington, 434 U.S. 497 (1978); Serfass v. United States, 420 U.S. 377 (1975); United States v. Jenkins, 420 U.S. 357 (1975); United States v. Wilson, 420 U.S. 332 (1975); United States v. Jorn, 400 U.S. 470 (1971). *See also* note 56, *supra*.

82. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 113-14 (1978); George, *United States Supreme Court*, B.Y.U. L. REV. 497, 531-32 (1978).