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CRIMINAL LAW

EXPANDED APPLICATION OF COLLATERAL ESTOPPEL DEFENSE IN CRIMINAL PROSECUTIONS

United States ex rel. *Rogers v. LaVallee*

The doctrine of collateral estoppel, when applied in criminal proceedings, bars relitigation of an issue of ultimate fact previously determined by a verdict of acquittal.[1] In *Ashe v. Swenson*[2] the Supreme Court established the collateral estoppel defense as a constitutionally mandated ingredient of the double jeopardy guarantee[3] and set forth a working standard for the application of that

[1] [Collateral estoppel] means simply that when 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 v. Swenson, 397 U.S. 436, 443 (1970). For a discussion of collateral estoppel in criminal prosecutions, see A. VESTAL, RES JUDICATA/PRECLUSION V-343 to -393 (1969); Note, *Criminal Procedure — Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions,* 49 N.C.L. REV. 351 (1971).

[2] 397 U.S. 436 (1970).

[3] *Id.* at 445. The fifth amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. While the double jeopardy prohibition has always guaranteed that no one be tried twice for the same offense, as a result of the *Ashe* decision it also operates to preclude relitigation of all issues necessarily decided by a prior acquittal.

Traditional double jeopardy protection is comprised of several defenses. Once a defendant has been acquitted of an offense, the same offense cannot be the basis of a new trial. *E.g.,* Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); United States v. Ball, 163 U.S. 662 (1896). Double jeopardy also prohibits the government from appealing judgments of acquittal if a reversal would require a new trial. *E.g.,* United States v. Jenkins, 420 U.S. 358 (1975). In addition, retrial is barred if the initial trial was aborted after the jury was impaneled and sworn but before a final judgment was reached. Since jeopardy is said to "attach" with the swearing of the jury, another trial for the same offense would constitute double jeopardy. *See* Downum v. United States, 372 U.S. 734 (1963). An exception to this rule arises when the initial trial is terminated by a mistrial declared for reasons of "manifest necessity." *See* note 26 *infra.*

The definition of "same offense" has traditionally created problems in the application of the double jeopardy prohibition. Most courts employ the "same evidence" test to determine whether a defendant has been placed in jeopardy a second time for the same offense. *See* 49 TEXAS L. REV. 148, 151 (1970). Under this test, which originated with Morey v. Commonwealth, 108 Mass. 433 (1871), if one offense "requires proof of a fact which the other does not," it is not considered the same offense. Blockburger v. United States, 284 U.S. 299, 304 (1932).

Justices Brennan, Douglas, and Marshall, urging adoption of the "same transaction" test, have claimed that it is constitutionally mandated by the double jeopardy clause. *See* Moton v. Swenson, 417 U.S. 957 (1974) (dissenting opinion); Grubb v. Oklahoma, 409 U.S. 1017 (1972) (dissenting opinion); Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (concurring opinion). This test requires that different statutory offenses arising out of the same act or transaction either be prosecuted simultaneously or precluded from litigation. J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 67 (1969).

A number of commentators have described the same evidence test as imposing a restrictive definition of "same offense" for double jeopardy purposes. *See* Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1, 30 (1960) [hereinafter cited as Mayers & Yarbrough]; Comment, *Statutory Implementation of Double*

defense in criminal proceedings. This standard requires a tribunal, in considering a plea of collateral estoppel, to examine the previous trial proceedings in their entirety and determine whether a rational jury could have based its verdict upon an issue different from that which the defendant endeavors to preclude from relitigation.[4] Under this approach, collateral estoppel can only operate to preclude reprosecution of those issues *necessarily* determined by a prior verdict of acquittal.[5]

The Second Circuit has noted that the collateral estoppel defense is rarely available to a criminal defendant since it is particularly difficult to ascertain precisely which issues have been finally determined by a judgment of acquittal.[6] In fact, the task of showing that the verdict in a prior trial *necessarily* decided the issues raised in the second prosecution has been labeled a "most difficult burden."[7] Nevertheless, in *United States* ex rel. *Rogers v. LaVallee*,[8] the Second Circuit expanded the application of the collateral estoppel defense by holding that it bars reprosecution of a defendant on a criminal count on which a previous jury was deadlocked when, contemporaneous with this deadlock, there had also been a simultaneous acquittal and deadlock of a lesser included offense of the count charged.[9]

Appellant Rogers was indicted in state court on two counts of first degree kidnapping.[10] One count charged the offense of ab-

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Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 YALE L.J. 339, 345 (1956); 69 MICH. L. REV. 762, 768 (1971). Application of the collateral estoppel doctrine to the double jeopardy guarantee, however, expands double jeopardy protection beyond the restrictive limits of the same evidence test. Whereas the latter only prohibits relitigation of the same offense, collateral estoppel operates to preclude the relitigation of those issues which have been previously settled even though the offenses involved may be different. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.418[2], at 2751 (2d ed. 1974); Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954) [hereinafter cited as Lugar]; Note, *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 FLA. ST. L. REV. 511 (1974).

[4] 397 U.S. at 444; *accord*, United States v. Davis, 460 F.2d 792 (4th Cir. 1972); United States v. Nash, 447 F.2d 1382 (4th Cir. 1971).

[5] *See* United States v. Gugliaro, 501 F.2d 68 (2d Cir. 1974); United States v. Tramunti, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); United States v. Nash, 447 F.2d 1382 (4th Cir. 1971).

[6] United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). The prevalence of general verdicts in criminal prosecutions militates against facile determination of those issues which the jury by its verdict has laid to rest. Lugar, *supra* note 3, at 332-33. *See also* Schaefer, *Unresolved Issues in the Law of Double Jeopardy*. Waller *and* Ashe, 58 CALIF. L. REV. 391, 395 (1970); Comment, *Double Jeopardy and Collateral Estoppel in Crimes Arising from the Same Transaction*, 24 MO. L. REV. 513, 519 & n.35 (1959).

[7] United States v. Gugliaro, 501 F.2d 68, 70 (2d Cir. 1974).

[8] 517 F.2d 1330 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3416 (U.S. Jan. 19, 1976), *rev'g* No. 73-CV-459 (N.D.N.Y., Aug. 29, 1974).

[9] 517 F.2d at 1334.

[10] Rogers was also indicted for felony murder and intentional murder, but was acquitted on both of these counts. The trial was conducted in the supreme court of the State of New York. *Id.* at 1331.

duction plus sexual abuse; the other charged abduction resulting in death.[11] The trial court instructed the jury that if it found the defendant not guilty of first degree kidnapping under the abduction plus abuse count, it should consider the lesser included offense of second degree kidnapping, *viz,* simple abduction.[12] The court next charged that if the defendant was acquitted of first and second degree kidnapping under that count, the jury could then consider first degree kidnapping under the count of abduction plus death.[13] Finally, the jury was instructed that if it found the defendant not guilty under the abduction plus death count, it could then again consider the lesser included offense of simple abduction.[14] Under these confusing and erroneous instructions, the jury returned a verdict of not guilty of first and second degree kidnapping under the count of abduction plus sexual abuse. The jury deadlocked, however, on both offenses under the count of abduction resulting in death.[15] A mistrial was therefore declared as to the latter count, with the anomalous result of a simultaneous deadlock and acquittal of the lesser included offense of simple abduction. Rogers was subsequently retried and convicted of the first degree kidnapping charge of abduction resulting in death.[16]

While confined in State prison, Rogers sought habeas corpus relief.[17] He claimed that the jury's acquittal verdict at the first trial

[11] N.Y. PENAL LAW § 135.25(2)(a), (3) (McKinney 1975) provides in pertinent part:

> A person is guilty of kidnapping in the first degree when he abducts another person and when:
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> . . . .
>
> 2. He restrains the person abducted for a period of more than twelve hours with intent to:
>
> (a) Inflict physical injury upon him or violate or abuse him sexually;
>
> . . . .
>
> 3. The person abducted dies during the abduction . . . .

[12] *See* United States *ex rel.* Rogers v. LaVallee, No. 73-CV-459 at 5 (N.D.N.Y., Aug. 29, 1974). The elements of simple abduction are set forth in N.Y. PENAL LAW § 135.00(2) (McKinney 1975). For the relevant provisions see text accompanying note 39 *infra.*

[13] *See* United States *ex rel.* Rogers v. LaVallee, No. 73-CV-459 at 6 (N.D.N.Y., Aug. 29, 1974).

[14] *Id.*

[15] *Id.*

[16] Rogers' conviction in the second trial was unanimously affirmed without opinion. People v. Rogers, 36 App. Div. 2d 1024, 321 N.Y.S.2d 1021 (2d Dep't 1971), *cert. denied,* 405 U.S. 956 (1972).

[17] Rogers' initial petition for habeas corpus relief in the federal district court was dismissed for factual insufficiency. United States *ex rel.* Rogers v. LaVallee, No. 71-CV-403 (N.D.N.Y., Aug. 31, 1971). On appeal, the Second Circuit remanded to the district court, directing it to dismiss the petition for failure to exhaust state remedies. United States *ex rel.* Rogers v. LaVallee, 463 F.2d 185 (2d Cir. 1972). Thereafter, Rogers brought a postconviction proceeding in the state court where relief was again denied. People v. Rogers, No. 217/1969 (Sup. Ct. Kings County, Feb. 8, 1973). Having thus exhausted his state remedies, Rogers reapplied for a writ of habeas corpus in the federal district court where his petition was dismissed on the merits. United States *ex rel.* Rogers v. LaVallee, No. 73-CV-459 (N.D.N.Y., Aug. 29, 1974). In the instant case, the Second Circuit considered Rogers' appeal from that dismissal.

conclusively established his innocence of simple abduction and that the State was therefore collaterally estopped from relitigating that issue in the subsequent reprosecution of abduction resulting in death.[18] The federal district court rejected this argument, finding the confused and inconsistent verdict not conclusive of Rogers' guilt or innocence of the act of abduction.[19] The Second Circuit, however, reversed on the ground that the jury had in fact rendered a dispositive acquittal of that offense.[20] Judge Oakes, writing for a divided panel,[21] stated that the source of the jury's inconsistent verdict was the erroneous trial court charge: the jury should have been instructed to consider second degree kidnapping only after it found the defendant not guilty of both counts of first degree kidnapping.[22] Nevertheless, according to the court, under the rule of *Ashe*, the verdict of acquittal necessarily decided the issues raised in the second prosecution.[23]

In a dissenting opinion, Judge Lumbard criticized the majority's application of the collateral estoppel rule.[24] Viewing the confused verdict in its entirety, the judge regarded the majority's unqualified recognition of the acquittal of simple abduction neglectful of the equally important deadlock on the same offense.[25] Thus, he refused to accept the majority's conclusion that the jury had, in fact, dispositively resolved the essential abduction issue.[26]

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[18] Brief for Relator-Appellant at 7, United States *ex rel.* Rogers v. LaVallee, 517 F.2d 1330 (2d Cir. 1975).

[19] United States *ex rel.* Rogers v. LaVallee, No. 73-CV-459 at 8 (N.D.N.Y., Aug. 29, 1974).

[20] 517 F.2d at 1334. The court stated: "In fact, . . . the jury did [acquit Rogers], however erroneously and no matter how confused." *Id.*

[21] Circuit Judge Oakes and District Judge Bartels, sitting by designation, constituted the majority. Circuit Judge Lumbard dissented.

[22] 517 F.2d at 1331-32.

[23] *Id.* at 1334.

[24] *Id.* at 1337 n.4 (Lumbard, J., dissenting).

[25] *Id.* at 1335.

[26] The determinative factor in the dissent's view was that the first trial resulted in the court's declaration of a mistrial with respect to the offenses of abduction resulting in death and simple abduction. *Id.* The dissent took the position that the instant case fit within the established rule, most recently expressed by the Supreme Court in Illinois v. Somerville, 410 U.S. 458 (1973), that the double jeopardy prohibition is no bar to reprosecution when a mistrial has been declared for reasons of "manifest necessity." 517 F.2d at 1336 (Lumbard, J., dissenting). A mistrial is most frequently deemed manifestly necessary when the jury cannot agree. *See* Keerl v. Montana, 213 U.S. 135 (1909). For other examples of this rule, see Parker v. United States, 507 F.2d 587 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975) (reprosecution permissible after declaration of manifestly necessary mistrial upon juror's hearing of prejudicial radio broadcast), and United States v. Walden, 448 F.2d 925 (4th Cir. 1971), *cert. denied*, 410 U.S. 969 (1973) (reprosecution impermissible since no manifest necessity for declaration of mistrial after two jurors saw defendant handcuffed).

The *Rogers* majority, on the other hand, focused primarily on the trial court's verdict of acquittal and therefore concluded that the *Somerville* rule was not controlling. 517 F.2d at 1334-35.

The Second Circuit in *Rogers* has adopted a position which gives expansive estoppel powers to a verdict of acquittal. In so doing, it appears that the court has exceeded the estoppel standard espoused by the Supreme Court in *Ashe*. The *Ashe* majority cautioned that the collateral estoppel rule in criminal cases should not be applied hypertechnically, but must be used realistically and rationally.[27] More specifically, the Court declared that its approach requires an examination of the entire proceedings[28] in order to properly conclude whether or not "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[29]

Prior to *Rogers*, in *United States v. Tramunti*[30] and *United States v. Gugliaro*,[31] the Second Circuit vigorously pursued the *Ashe* directive. Defendants Tramunti and Gugliaro had been indicted along with 14 others on conspiracy charges arising from the manipulation of securities of the Imperial Investment Corp.[32] Although the defendants were acquitted of these charges, they were subsequently convicted of perjury based on false testimony given at the Imperial trials.[33] Each defendant raised the collateral estoppel defense claiming that his prior acquittal established that the jury in the Imperial trials had determined in his favor the issue of the truthfulness of his testimony.[34] Rejecting the defendants' contentions, the *Gugliaro* and *Tramunti* courts stressed the necessity of viewing the events of the conspiracy proceedings in their entirety and appeared to place particular emphasis on the nature of the evidence and the charge given by the trial court.[35] Upon examination of the proceedings, it was determined that the juries could have based their respective verdicts on an issue other than the truthful-

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[27] 397 U.S. at 444.

[28] The *Ashe* Court emphasized the need to examine the prior proceedings in their entirety, including the "'pleadings, evidence, charge, and other relevant matter.'" *Id.*, *quoting* Mayers & Yarbrough, *supra* note 3, at 38.

[29] 397 U.S. at 444, *quoting* Mayers & Yarbrough, *supra* note 3, at 38-39. In *Ashe*, six poker players were robbed by a group of men. Petitioner Ashe was prosecuted for the robbery of Knight, one of the players. The jury returned a verdict of not guilty for want of sufficient evidence. Ashe was subsequently retried for the robbery of Roberts, another poker player. This time, however, the State's evidence was stronger and Ashe was convicted. The Court held that the doctrine of collateral estoppel, as an ingredient of the double jeopardy guarantee, barred the reprosecution of Ashe since it had been determined previously by the jury in the first trial that the petitioner was not among the robbers. 397 U.S. at 445-47.

[30] 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974), *noted in* 49 ST. JOHN'S L. REV. 313 (1975).

[31] 501 F.2d 68 (2d Cir. 1974).

[32] 500 F.2d at 1337; 501 F.2d at 69.

[33] 500 F.2d at 1337; 501 F.2d at 69.

[34] 500 F.2d at 1346; 501 F.2d at 70.

[35] 500 F.2d at 1346-47; 501 F.2d at 71.

ness of the defendants' testimony.[36] Accordingly, the doctrine of collateral estoppel was held to be inoperative.[37]

By focusing primarily upon the verdict of acquittal, the *Rogers* majority appears to have circumvented the directive of *Ashe* which requires an examination of the proceedings in their entirety. It is submitted that the court, in effect, removed the acquittal verdict from the context of the proceedings by holding that it operated to preclude relitigation of the abduction issue despite the existence of a simultaneous deadlock. An examination of the entire proceedings, including the trial court's instructions and the jury's subsequent deadlock, lends strength to the dissent's position that the acquittal verdict was not dispositive of the essential abduction issue.[38]

To "abduct," under the governing statute, is

> to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force.[39]

A jury which correctly understood the elements of simple abduction could have acquitted Rogers of that offense under the count of abduction plus sexual abuse for any or all of three reasons: (1) the defendant did not commit the act of restraint of a person under any circumstances; (2) the defendant lacked the requisite intent to prevent the person's liberation; and/or (3) the defendant did not employ either of the two proscribed methods of restraint.

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[36] On the basis of its examination of the nature of the evidence which had been presented at trial, the *Gugliaro* court surmised that the jury might have doubted the defendant's credibility, yet acquitted him on finding that he lacked the requisite intent or sufficient knowledge to be a conspirator. 501 F.2d at 71. In *Tramunti*, the court closely examined the trial court charge and the weakness of the Government's evidence and concluded that the jury could have disbelieved the defendant's alibi and still have acquitted him for lack of specific intent. 500 F.2d at 1347.

[37] 500 F.2d at 1349; 501 F.2d at 72. Other circuits have similarly adhered to the *Ashe* requirement of examining the events of the entire proceedings in order to determine whether the relevant issues have already been settled. In United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974), for example, where the Fourth Circuit held that a verdict of acquittal on a charge of child abuse did not establish the defendant's innocence with respect to all acts of misconduct against the child, the court expressly recognized *Ashe* as "authority for examining the complete record of the initial trial to determine what has been litigated and decided." 484 F.2d at 137. *Accord*, Johnson v. Estelle, 506 F.2d 347 (5th Cir.), *cert. denied*, 422 U.S. 1024 (1975); Phillips v. United States, 502 F.2d 227 (4th Cir. 1974), *rev'd per curiam*, 518 F.2d 108 (1975) (en banc).

> [38] I am not persuaded that the Double Jeopardy Clause . . . prohibited New York from again trying James Rogers . . . . In contrast to the majority, which focuses on the not-guilty verdicts . . . , for me the determinative consideration is that Rogers' first trial ended in a hung jury, deadlocked over whether Rogers was guilty of abduction resulting in death or even simple abduction . . . .

517 F.2d at 1335 (Lumbard, J., dissenting) (footnote omitted).

[39] N.Y. PENAL LAW § 135.00(2) (McKinney 1975).

An acquittal of simple abduction under the count of abduction plus sexual abuse for any of these reasons necessarily dictates an acquittal of simple abduction and first degree kidnapping under the count of abduction plus death. Thus, a rational jury which clearly understood the components of simple abduction would not, after having voted to acquit the defendant of that crime under one count, entertain any doubts with respect to the defendant's guilt of the very same crime under another count. The very existence of the deadlock, therefore, may be viewed as evidence of the possibility that the jury was confused and acquitted Rogers for a reason other than one of the three set forth above. The presence of the erroneous trial court instructions increases the likelihood that this was in fact the case. As both the dissent[40] and the district court[41] noted, the jury may have concluded that the offense of simple abduction, as charged, was to be treated as two separate offenses, each containing different elements derived from the greater offense to which it was tied. For example, the jury may have thought that simple abduction under the count of abduction plus sexual abuse included the 12-hour time requirement of that major offense,[42] whereas simple abduction under the count of abduction plus death contained no such requirement.[43] Arguably, therefore, the *Rogers* majority has given estoppel effect to an acquittal which did not resolve the essential issue of the subsequent reprosecution.

The *Ashe* decision and prior decisions of the Second Circuit[44] indicate that the estoppel powers of an acquittal should extend only to issues which have *necessarily* been decided in a prior prosecution. The expansive interpretation given the scope of the collateral estoppel defense by the court in *Rogers* sharply contrasts with the approach of these earlier holdings. As the Second Circuit noted in *Tramunti*, a heavy burden rests upon the defendant to show that the previous verdict necessarily decided the issues which he seeks to preclude from relitigation.[45] Mindful that "it is usually impossi-

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[40] 517 F.2d at 1335 (Lumbard, J., dissenting).

[41] United States *ex rel.* Rogers v. LaVallee, No. 73-CV-459 at 8 (N.D.N.Y., Aug. 29, 1974).

[42] *See* N.Y. PENAL LAW § 135.25(2) (McKinney 1975).

[43] *Id.* § 135.00(2), *quoted in* text accompanying note 39 *supra*. The majority was wary of judicial inquiry into the minds of the jurors: "[T]o read in a 12 hour definition to the second degree kidnapping charge is conjecture and ignores the fact that at no time was such a charge given." 517 F.2d at 1334 n.10. The majority, on the other hand, appears to have ignored the fact that the erroneous trial court instructions clearly confused the jury and created an extraordinary opportunity for the jury to indulge in such conjecture.

[44] *See* United States v. Gugliaro, 501 F.2d 68 (2d Cir. 1974); United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974).

[45] 500 F.2d at 1346.

ble to determine with any precision upon what basis the jury reached a verdict," the *Tramunti* court declared that "it is a rare situation in which the collateral estoppel defense will be available to a defendant."[46]

In *United States v. Kramer*,[47] a rare case in which the Second Circuit sustained the defendant's reliance on the collateral estoppel defense, it did so only because of the absence of any ground for acquittal other than that upon which the defendant relied. In *Kramer*, the appellant had been acquitted of a number of substantive offenses arising from the burglary of two United States post offices. He was later convicted of four related offenses arising from the same burglaries.[48] On appeal from that conviction, Kramer alleged that the Government was seeking to relitigate facts determined in his favor in the first prosecution. The Second Circuit examined the initial proceedings and discovered that the jury at the first trial had been presented with one exceedingly simple issue, namely, the defendant's participation or lack of participation in the post office thefts.[49] Accordingly, the court concluded that the verdict of acquittal at the first trial could only mean that Kramer was not responsible for the burglaries: "Unlike many other criminal cases, this one was devoid of alternative [bases upon which the acquittal could rest]."[50]

Taken together, the *Kramer*, *Gugliaro*, and *Tramunti* decisions reflect what has been the limited availability of the collateral estoppel defense in the Second Circuit. *Rogers*, on the other hand, represents a marked departure from this approach. The aftermath of this decision may be even greater uncertainty as to the judicial disposition of pleas of double jeopardy based on the rule of collateral estoppel. Hopefully, *Rogers* will be treated as an exception to the general rule because of its unique and irksome fact pattern.[51] It appears that the Second Circuit strained to uphold the integrity of

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[46] *Id.*

[47] 289 F.2d 909 (2d Cir. 1961).

[48] *Id.* at 912.

[49] *Id.* at 914.

[50] *Id.* The Fifth Circuit sustained the collateral estoppel defense in Johnson v. Estelle, 506 F.2d 347 (5th Cir.), *cert. denied*, 422 U.S. 1024 (1975). There, the court considered whether an acquittal of burglary with intent to commit rape barred a later conviction of assault with intent to commit rape. Engaging in extensive analysis of the possible bases for the acquittal, the court concluded that a rational jury would not have acquitted on the basis of issues different from those raised in the second trial. 506 F.2d at 350. The court apparently reasoned that the basis of the jury's acquittal was so clear as to rule out all other alternatives.

[51] The *Rogers* district court remarked that "this court's research indicates the petition herein presents a case of first impression and is *sui generis* factually." United States *ex rel.* Rogers v. LaVallee, No. 73-CV-459 at 2 (N.D.N.Y., Aug. 29, 1974).

the double jeopardy guarantee, perhaps losing sight of the important balance that must be struck between the interests of a defendant and the interests of society as a whole.[52]

Nina Shreve

TECHNICAL DEFECTS IN FEDERAL SEARCH WARRANTS

United States v. Burke

In addition to guaranteeing freedom from "unreasonable searches and seizures," the fourth amendment declares that no "[search] Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Rule 41 of the Federal Rules of Criminal Procedure, which implements this constitutional mandate, specifies a number of technical requirements with which a federal warrant must comply before evidence procured pursuant thereto can be introduced as such in a prosecution for a federal crime. These technical requirements must be complied with both when a warrant is issued pursuant to rule 41 by either a state or federal magistrate and when a validly issued state warrant is treated as a federal warrant in a federal criminal proceeding because "federal officials participated in its procuration or execution."[1]

There are, however, circumstances in which noncompliance with rule 41 may be overlooked. Notwithstanding the specificity of the rule, there appears to be a growing awareness of the need to disregard those requirements which are not constitutionally mandated, thus limiting the extent to which evidence seized pursuant to a defective federal warrant must be suppressed.[2] Adopting this

[52] In his dissent in United States v. Jenkins, 490 F.2d 868 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975), Judge Lumbard spoke of the public interest which must be considered when a defendant raises the double jeopardy defense. In his view, the individual's interest in escaping the anxiety of a second trial must be weighed against the equally important societal interest in public justice. 490 F.2d at 884 (Lumbard, J., dissenting).

[1] United States v. Sellers, 483 F.2d 37, 43 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

[2] A number of recent cases indicate the judiciary's growing tolerance for technically defective search warrants. *See* United States v. Sturgeon, 501 F.2d 1270 (8th Cir.), *cert. denied*, 419 U.S. 1071 (1974); United States v. Sellers, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); United States v. Soriano, 482 F.2d 469 (5th Cir. 1973), *aff'd in part and rev'd in part on rehearing en banc*, 497 F.2d 147 (1974). In line with this approach, the American Law Institute (ALI) recommends exclusion of seized evidence only where the alleged "defect is of constitutional dimension." ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2, comment at 563 (Proposed Official Draft, Apr. 15, 1975). In other words, the ALI advocates denial of a motion to suppress when the defects cited as giving rise