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# Criminal Procedure -- Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions

Bruce J. Downey Jr.

Perhaps the best means of obviation of these difficulties is also the simplest—elimination of the purpose inquiry. After all, one wonders why even the most fastidious atheist would object to a statute, the admitted purpose of which is the establishment of an official religion, but which is wholly ineffectual to accomplish that result.

Since the Court did not summarily dispose of the exemption issue as it apparently could have,[44] it would seem that it considered *Walz* to be an appropriate vehicle for definitive exposition of its views on the establishment clause. *Walz* does indicate that the Court will use the free exercise clause and a degree test to limit the operation of the establishment clause, especially when the "aid," albeit substantial, is afforded equally to all religions. Adoption of a degree test was an appropriate step towards more refined consideration of establishment issues, but the unfortunate use of church-state "involvement" per se, without clarification, as the measure of the validity of the exemption has not contributed to that goal, and it still remains for the Court to do what it has already said the first amendment does with respect to church-state relations—"studiously [define] the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."[45]

R. B. TUCKER, JR.

## Criminal Procedure—Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions

In *Ashe v. Swenson*[1] the Supreme Court has constitutionally required a variation of the civil law doctrine of collateral estoppel for state criminal trials.[2] The Court defined collateral estoppel as the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any

[44] See p. — & note 9 *supra*.
[45] Zorach v. Clauson, 343 U.S. 306, 312 (1952).

[1] 397 U.S. 436 (1970).
[2] Collateral estoppel, as required in criminal cases is distinguishable in two ways from that traditionally applied in the civil law. First, the requirement of mutuality—that a party cannot benefit from the doctrine unless he would be bound by it if the opposite result had been reached—is not carried over into the criminal law. Second, the general verdict of a criminal trial requires some speculation as to its basis that the special verdict of the civil trial often does not. For a good discussion of the problems of mutuality and the general verdict *see* Note, *Collateral Estoppel in Criminal Cases*, 28 U. CHI. L. REV. 142 (1960).

future lawsuit."[3] This note will explore the justification for, and the ramifications of, the adoption of collateral estoppel as a constitutional requirement in state criminal trials.

Ashe was charged with six separate counts of armed robbery arising out of his alleged participation, with three others, in the armed robbery of six members of a single poker game. Ashe was first tried on one of those counts, for the robbery of one of the victims, and the jury, although not instructed to elaborate on its verdict, found him not guilty by reason of insufficient evidence. The only contested issue at that trial was the identity of Ashe as one of the robbers; and the prosecution witnesses, four of the six victims, gave weak testimony on this point.[4]

Six weeks later Ashe was tried on a second count for the robbery of another of the victims. At this trial the prosecution witnesses gave much stronger testimony,[5] and the jury returned a guilty verdict. The Supreme Court of Missouri affirmed the conviction denying Ashe's plea of former jeopardy;[6] Ashe then brought a federal habeas corpus proceeding. The district court denied the writ,[7] the court of appeals affirmed,[8] and the United States Supreme Court granted certiorari.[9] Justice Stewart, writing the Court's opinion, held that the doctrine of collateral estoppel was inherent in the fifth amendment's guarantee against double jeopardy and, therefore, enforceable against the states.[10] Justice Stewart said that the single issue determined in the first trial was that there was reasonable doubt that Ashe was one of the robbers and that the doctrine of collateral estoppel prevented the state from retrying this issue in the second trial.

In the single dissent Chief Justice Burger argued that collateral estoppel is not inherent in the fifth amendment guarantee against double jeopardy, remarking that if it is, it has eluded judges and justices for

[3] 397 U.S. at 443.

[4] One of the witnesses said Ashe sounded much like one of the robbers, and another identified Ashe by his size and actions. Two of the prosecution witnesses thought there had only been three robbers and were unable to identify Ashe as one of them. *Id.* at 438.

[5] Two witnesses who had been unable to identify Ashe now said his features matched those of one of the robbers. *Id.* at 440.

[6] State v. Ashe, 350 S.W.2d 768 (Mo. 1961).

[7] Ashe v. Swenson, 289 F. Supp. 871 (W.D. Mo. 1967).

[8] Ashe v. Swenson, 399 F.2d 40 (8th Cir. 1968).

[9] Ashe v. Swenson, 393 U.S. 1115 (1969).

[10] 397 U.S. at 445. In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court held that the double jeopardy clause of the fifth amendment is enforceable against the states through the fourteenth amendment. In a companion case to *Benton*, North Carolina v. Pearce, 395 U.S. 711 (1969), the Court accorded full retroactivity to the *Benton* doctrine.

two centuries and that collateral estoppel is not applicable in the *Ashe* fact pattern because the basis of the jury's verdict is not readily determinable. The Chief Justice visualized the guesswork required to discern the verdict's basis, when all the court has before it is a general verdict from a jury allowed to reach inconsistent results, as an inherent and fatal weakness in the use of collateral estoppel in criminal trials.

The United States Supreme Court had earlier wrestled with the problem of collateral estoppel in criminal prosecutions both in supervisory review over the federal courts and constitutional review over the state courts.[11] Justice Stewart pointed out in *Ashe* that collateral estoppel is an established principle in federal criminal law.[12] However, when previously confronted with a fact pattern almost identical to that in *Ashe*, the Court had implied in *Hoag v. New Jersey*[13] that collateral estoppel was not a doctrine of constitutional proportions.[14] The Court purported to explain the inconsistency of *Ashe* and *Hoag* by saying, "The doctrine of *Benton* . . . puts the issues in a perspective quite different from that in which the issues were perceived in *Hoag v. New Jersey*. The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy."[15]

Justice Stewart cites no authority for the proposition that collateral estoppel is embodied in the fifth amendment guarantee against double jeopardy and dismissed this question by stating, "Whether its [collateral estoppel's] basis was a constitutional one was a question of no more than academic concern until this Court's decision in *Benton v. Maryland*."[16] Indeed, the cases Justice Stewart cited as authority for his statement that collateral estoppel is an established rule of federal law seem to consider

[11] In supervisory review over the federal courts the Supreme Court required collateral estoppel in United States v. Oppenheimer, 242 U.S. 85 (1916), and held it could be used even with a general verdict in Sealfon v. United States, 332 U.S. 575 (1948). The court of appeals held that lack of mutuality would not be a bar to the use of collateral estoppel in United States v. Kramer, 289 F.2d 909 (2d Cir. 1961). In constitutional review over the state courts the Supreme Court refused to require collateral estoppel in Hoag v. New Jersey, 356 U.S. 464 (1958).

[12] 397 U.S. at 443.

[13] 356 U.S. 464 (1958).

[14] The Supreme Court said that "[d]espite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this court has never so held." *Id.* at 471. The decision, however, was based on other grounds.

[15] 397 U.S. at 442.

[16] *Id.* at 446-47 n.10.

collateral estoppel and the fifth amendment guarantee against double jeopardy as separate doctrines. In *United States v. Oppenheimer*[17] the Court said, regarding collateral estoppel, that "the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . . ."[18] In *Sealfon v. United States*[19] the Court granted the petitioner relief on grounds of collateral estoppel after he had abandoned his plea of double jeopardy. This implies a difference in the doctrines. In the other major case cited by Justice Stewart, *United States v. Kramer*,[20] the court also construed the fifth amendment's double jeopardy protection and collateral estoppel as separate doctrines.[21] Thus there is at least some basis for Chief Justice Burger's complaint that the Court is taking a step in constitutional law on no more than a feeling that *retrial of issues* has the same double "run[ning of] the gantlet"[22] effect that the fifth amendment guarantees against for *retrial of offenses.*

In examining the policy considerations involved in deciding whether the Court was correct in adopting collateral estoppel as a requirement for the states, it is important to stress one thing at the outset. The question is not which policy is fairest or most efficacious; but rather it is, in light of our federal system, which policy is required by the Constitution. However, the Court does have considerable leeway in deciding whether collateral estopel is "embodied" in the fifth amendment, and in this light it is important to consider what might influence a decision based on this question.

In *Ashe* the Court wanted to prevent a state prosecutor from using the separate crimes involved in a multiple-victim situation to give the state an advantage over the defendant. Justice Stewart said:

> [The state] treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost . . . he refined his

[17] 242 U.S. 85 (1916).
[18] *Id.* at 88.
[19] 332 U.S. 575 (1948).
[20] 289 F.2d 909 (2d Cir. 1961).
[21] Kramer appeals from the District Court's overruling of his contention that the Connecticut judgment barred a later prosecution under the clause of the Fifth Amendment forbidding that "any person be subject for the same offense to be twice put in jeopardy of life or limb," and, alternatively, that it precluded the Government from relitigating issues necessarily determined in the earlier trial. We hold the District Court was right as to the former, wrong as to the latter.
*Id.* at 912.
[22] 397 U.S. at 465.

> presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.[23]

Certainly, the prevention of intentional harassment of defendants is a worthwhile objective. To what extent will collateral estoppel achieve this objective? An analysis of the holding in *Ashe* shows that its protection is not as far reaching as it sounds. The Court held that when a defendant has been acquitted of one crime arising from a multiple-victim transaction, and the facts of the case shows the reasons for the jury's decision are unarguably clear,[24] the states will be precluded from relitigation of these previously decided points. From this statement of the holding we can see that collateral estoppel would be of no benefit to a defendant if (a) the first trial resulted in a conviction; (b) the conclusion of the jury could not be readily determined, as would be the case if Ashe had contested the issue of whether a robbery in fact took place as well as whether he was one of the perpetrators of it; or (c) the issue decided in the first trial was not conclusive as to the offense in the second trial. For example, if the first jury had based the acquittal on a finding that nothing was taken from the victim, this would not prevent a second trial on the question of whether anything was taken from a different victim. Also, there are several different types of offenses that can result in multiple crimes, and the protection given to Ashe in the multiple-victim case might not be accorded to a defendant accused of a different type of multiple crime. In a recent case, *United States v. Fusco*,[25] the Court of Appeals for the Seventh Circuit held, citing *Ashe*, that collateral estoppel would apply to prevent subsequent prosecution for crimes distinct in terminology. After Fusco's conviction for theft was reversed on appeal without remand,[26] his subsequent conviction for possession of the stolen goods was reversed because "[t]he ultimate fact of Fusco's involvement . . . already had been determined . . . ."[27] Another area of subsequent prosecutions, one which was mentioned in Justice Brennan's concurring opinion in *Ashe*, was that of subsequent prosecutions for crimes that are separable chronologically. In the celebrated case of *Johnson v. Commonwealth*,[28] seventy-five poker

[23] *Id.* at 447.

[24] The Court found that the reason the jury found Ashe not guilty in the first trial could only have been that they believed he was not one of the participants. *Id.* at 446.

[25] 427 F.2d 361 (7th Cir. 1970).

[26] 398 F.2d 32 (7th Cir. 1968).

[27] 427 F.2d at 363.

[28] 201 Ky. 314, 256 S.W. 388 (1923).

hands were held to be seventy-five separate offenses of gambling. It does not follow that collateral estoppel would be applicable in this situation because one hand of poker may not, due to an absence of betting for example, have reached the statutory level of gambling while the next hand may have.[29]

Justice Brennan, joined by Justices Douglas and Marshall, concurred with Justice Stewart's majority opinion that collateral estoppel should apply but added that the doctrine of double jeopardy alone should bar the subsequent conviction. The fifth amendment provides, in part: "nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb . . . ."[30] In determining what constitutes the same offense the Court has looked to the "same evidence" test[31]—if different evidence is required, the offenses are different. Justice Brennan insisted that the "same transaction" test should be substituted and that any crimes arising from a single criminal act, occurrence, episode, or transaction should be treated as the same offense for fifth amendment purposes.[32]

Would Justice Brennan's "same transaction" test go further than the collateral estoppel rule in preventing harassment of defendants by multiple trials? Undoubtedly, yes. If the double jeopardy theory is followed, there could be no subsequent trials when the basis of the jury's first acquittal was unclear or even when the first trial resulted in a conviction. A type of merger would operate because the double jeopardy theory would prevent retrial of any part of the single transaction. Even though the "same transaction" test for double jeopardy would prevent most of the harassment of defendants by multiple trials, there are still valid reasons for opposing its adoption. It is not clear that this rule would work completely to the defendant's advantage. There are certainly situations where the defendant

[29] An interesting area for expansion of collateral estoppel as used in criminal law appears in the multiple-criminal cases. The Supreme Court has said that the lack of mutuality poses no problem for the use of collateral estoppel. 397 U.S. at 443. Does it not follow that it should not have to be the same party pleading the estoppel? If two defendants are charged with auto theft, and the sole issue in the trial of the first was whether the prosecuting witness had given permission to use the car, should not the second defendant be able to rely on an acquittal of the first defendant to estop the state from relitigation of the issue of permission?

[30] U.S. CONST. amend. V (emphasis added).

[31] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[32] 397 U.S. at 453-54. Justice Harlan concurred with the majority opinion in *Ashe* but made the specific reservation that the decision was not to include the adoption of the "same transaction" test advanced by Justice Brennan in his concurring opinion. *Id.* at 448.

would prefer not to have the whole transaction tried in one trial.[33] Society's interest in convicting the guilty also must be weighed. Perhaps we do not want always to force prosecutors to try defendants for multiple crimes in a single trial. The possibility of cross issues and confusion in particularly complex crimes is apparent. The example of a man killing his wife and her paramour in a moment of passion, killing his neighbors because they witnessed the first crime, and killing someone else because he had become insane from all this killing is an unlikely one; but it does show that it is possible for what might be considered a single transaction with only one defendant to have some very complex issues involved.

In considering the equities involved in multiple trials the individualist might point to the freedom of choice on the defendant's part. Essentially, it is the defendant who decides to commit multiple crimes, and viewed from this perspective one might say that he is subjecting himself to the possibility of multiple trials.[34] While the *Ashe* fact pattern does not present a very appealing case for the idea of choice because we view the decision as one of robbing a "game," is it really unfair to require a defendant accused of individually and willfully murdering four bank tellers during a robbery to come to trial four times? Some crimes are essentially more like a single transaction than others. This may be more of an emotional than a rational distinction, but it does seem less unfair to have multiple trials in the bank teller situation than the *Ashe* situation. Also, a problem will arise in defining what is and what is not a "single transaction." If a man is accused of passing five hundred bad checks in the past year, fifty in the past month, ten yesterday, and five in one hour yesterday, there seems to be no rational distinction for calling one part of that series a single transaction and not another. If Justice Brennan wants the

[33] For example, in a trial for rape and robbery, a defendant may well feel that his chances of being acquitted for either of these offenses would be greatly reduced by a decision in the mind of the jury that he was guilty of the other. There also may be a fear on the part of an innocent defendant that a jury, confronted with several counts arising from a single transaction, may compromise by finding him guilty of some and innocent of others. Finally, the defendant may fear that the jury members may harbor the feeling that with all these charges against him, he must have done something.

[34] This analysis is subject to the criticism that it presupposes guilt and does not take into account the plight of the innocent defendant confronted with multiple trials. Indeed, it does allow for hardship on the part of the innocent defendant when there is great evidence against him. However, the requirement of only "proof beyond a reasonable doubt" reflects the belief that a workable system will involve some such hardship. The innocent defendant with less proof against him will probably not be brought to trial a second time simply as a matter of prosecutorial discretion.

defendant to be tried for all crimes known to the prosecutor when the defendant is brought to trial, then the problem of complexity mentioned before will be greatly magnified.

These reasons for opposing the adoption of the "same transaction" test for double jeopardy apply, though with considerably less force, to the adoption of collateral estoppel. It must be remembered, though, that collateral estoppel has considerably less effect in curing the abuse of harassment through multiple trials. However, collateral estoppel has a preventive side that the total cure—the "same transaction" test for double jeopardy—does not need. The prosecutor will be forced to try the defendant for all of the crimes involved in a single transaction because he cannot know beforehand what will result during the first trial. If he first brings the defendant to trial for only one crime in an attempt to feel out the defense and test his approach, he may well be estopped from proving a point vital to his prosecution in the subsequent trial for another of the crimes. Where, heretofore, a multiple-crime transaction has given the prosecutor virtually a free try[35] at the defendant in which he could discover the defenses and polish up his case, at least now the prosecutor knows that further trials may be foreclosed by the doctrine of collateral estoppel.

After consideration of the policies involved, the result in *Ashe* appears to have been the best alternative. The application of collateral estoppel should result in better prepared prosecutions and less harassment of defendants without some of the risks of the almost total exclusion of multiple trials required by the adoption of the "same transaction" test for determining double jeopardy.

BRUCE J. DOWNEY, III

## Federal Courts—Choice of Controlling Law in Cases Involving Federally Insured Mortgages

In a recent Ninth Circuit Court of Appeals decision, *United States v. Stadium Apartments, Inc.*,[1] the court held that the Federal Housing

[35] Calling this a free try does, however, ignore the fact that the prosecution has lost the opportunity to get additional punishment for the additional crime; but the common practice of concurrent running of the sentences in an *Ashe* situation combined with the small likelihood that a prosecutor, having secured one conviction, would bring prosecutions on the other crimes minimizes this distinction.

[1] 425 F.2d 358 (9th Cir. 1970).