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ADMISSIBILITY OF PRIOR ACQUITTED CRIMES UNDER RULE 404(b): WHY THE MAJORITY SHOULD ADOPT THE MINORITY RULE

MIGUEL MANUEL DELAO

CAN IT ever be fair for prosecutors to try to convict defendants with evidence of a prior crime of which the defendant was acquitted? The concept of fairness is fundamental to the American criminal justice system. As stated by Blackstone: "it is better that ten guilty persons escape, than that one innocent suffer." To effectuate this principle, the system provides defendants with nearly every safeguard necessary to prevent miscarriages of justice. These safeguards include requiring the government to prove the guilt of the accused beyond a reasonable doubt, and providing defendants with a presumption of innocence.

The Federal Rules of Evidence also play an important role in preserving these principles of fairness and justice. For example, Rule 404(b) of the Federal Rules of Evidence generally prohibits the admission of evidence of a defendant's bad character or a trait of character to prove action in conformity therewith. However, there are exceptions to this rule, including evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same. The rule is designed to prevent the introduction of irrelevant or prejudicial evidence that could unfairly prejudice the jury.

The federal rules provide other less obvious safeguards as well. For example, hearsay evidence is not admissible under the former testimony exception unless the defendant had an opportunity to cross-examine the declarant. See Fed. R. Evid. 804(b)(1).
404(b) prohibits the introduction of evidence of other crimes to prove the defendant acted in conformity with his or her bad character, although such evidence may be admissible for other purposes. Fairness is further preserved through Rule 403 which allows courts to eliminate evidence of other crimes if its prejudicial effect substantially outweighs its probative value.

However, these rules do not distinguish between evidence of a prior crime of which the defendant was acquitted (prior acquitted crime or prior acquittal), and evidence of a prior crime of which the defendant was convicted. Although evidence offered in prior convictions may be admissible if offered for a proper purpose under Rule 404(b), it remains unsettled whether prior acquittals, even when relevant, should be admissible.

7. Rule 404(b) provides that:
   [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

8. Evidence of other crimes is also referred to as extrinsic offenses, collateral crimes evidence, prior bad acts, and prior crimes.

9. McCormick has identified nine exceptions applicable to this discussion: (1) to complete the story of the crime; (2) to prove plan, scheme, or conspiracy; (3) to prove the defendant's modus operandi; (4) to show propensity for unusual sexual relations; (5) to disprove accident or mistake; (6) to establish motive; (7) to establish opportunity; (8) to show malice, deliberation, or requisite specific intent; and (9) to prove identity. MACCORMICK ON EVIDENCE § 190, at 558-64 (3d ed. 1984). See infra notes 178-238 and accompanying text for a discussion of these exceptions. In practice, the exceptions have become the rule, so "other crimes" evidence is almost always admitted. Note, Evidentiary Use of Prior Acquitted Crimes: The "Relative Burdens of Proof" Rationale, 64 WASH. U.L.Q. 189, 197-98 (1986).

10. See Fed. R. Evid. 403.

11. In this Comment, evidence concerning a prior crime of which the defendant was acquitted will be referred to as a prior acquitted crime or a prior acquittal. Introducing a prior acquittal does not refer to the introduction of certified court documents attesting to the fact the defendant was acquitted. Rather, it refers to the introduction of testimony and other tangible evidence concerning the prior crime.

12. The Supreme Court likely will resolve the conflict among the federal circuits in United States v. Dowling, 855 F.2d 114 (3d Cir. 1988), cert. granted, 109 S. Ct. 1309 (1989). The questions presented in Dowling are:
   (1) Does either Due Process or Double Jeopardy Clause of Fifth Amendment bar, in federal criminal prosecution, introduction of evidence concerning prior unrelated criminal conduct for which defendant has been previously tried and acquitted?
   (2) If so, did court of appeals erroneously use statutory harmless error standard rather than more stringent standard required by Chapman v. California, 386 U.S. 18 (1967), after determining that such evidence had been erroneously admitted?

This Comment examines the different approaches taken by the courts that have addressed the admissibility of prior acquittals. The Comment contends that significant constitutional implications arise when the evidence stems from a crime of which the defendant was acquitted, and concludes that evidence regarding settled factual issues from an acquittal should be inadmissible in almost every circumstance.

I. APPROACHES TO THE ADMISSIBILITY OF PRIOR ACQUITTED CRIMES

Courts addressing the admissibility of prior acquittals have taken three different approaches. The majority view treats prior acquittals the same as prior convictions, performing a Rule 403 balancing test and determining whether the evidence is offered for a proper purpose under Rule 404(b) before admitting the evidence. The minority view is that a prior acquitted crime is inadmissible if the issue the government seeks to prove was litigated in the prior trial and decided for the defendant, even if the evidence otherwise meets the requirements of Rule 403 and Rule 404(b). The third approach, a modified version of the minority view, was recently created by the United States Court of Appeals for the Sixth Circuit. Under this approach, the use of prior acquitted crimes is prohibited only where the issue the government seeks to prove through the prior acquittal was expressly considered and rejected by the prior jury.

A. The Majority View: Prior Acquitted Crimes Treated as Any Other Evidence

The majority rule is that a prior acquitted crime is admissible under Rule 404(b) if it otherwise meets the requirements of the rule, a

13. This Comment concerns only cases where the defendant has been acquitted of the extrinsic offense. Where the defendant was convicted or remains uncharged, or where a mistrial or nolle prose was granted, the extrinsic offense is admissible under Rule 404(b). If the judge grants a motion for a judgment of acquittal because no reasonable jury could convict the defendant, it would have the same effect as an acquittal. If evidence of a prior crime is introduced against a defendant on trial, which results in a conviction, and the defendant is subsequently acquitted of the prior crime, no relief is available. Smith v. Wainwright, 568 F.2d 362, 364-65 (5th Cir. 1978) (conviction is not invalidated by a subsequent acquittal of the prior crime because juries sometimes exercise the practical power of pardon).

14. Although it is impossible to know with absolute certainty the basis for a jury verdict, courts have taken a common-sense approach to this question, drawing reasonable inferences from the trial transcript. See infra notes 164-77 and accompanying text.

15. Although the numerical disparity has narrowed, commentators have observed that the majority of jurisdictions follow this view. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[10], at 404-74 (1988); Annotation, Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of that Offense, 25 A.L.R.4th 934, 939 (1983).
proper Rule 403 balancing is conducted to prevent unfair prejudice to the defendant,16 and the evidence is pertinent to a disputed issue in the trial.17 The decision on admissibility is solely within the trial judge’s discretion,18 although the judge must allow the defendant to inform the jury of the acquittal.19 Jurisdictions following the majority rule do not apply the doctrine of collateral estoppel,20 as articulated in Ashe v. Swenson,21 to evidence of extrinsic offenses.22 These jurisdictions view the defendant’s acquittal of the extrinsic offense as inconsequential to admissibility under Rule 404(b).23 The majority view has been adopted


17. See, e.g., United States v. Phillips, 401 F.2d 301, 305 (7th Cir. 1968) ("evidence of prior crimes is admissible only if it is relevant to an issue of material fact in the case").

18. See, e.g., United States v. Castro-Castro, 464 F.2d 336, 337 (9th Cir. 1972) ("despite the acquittal the matter of admission or rejection is and should be addressed to the sound discretion of the trial judge") (quoting Hernandez v. United States, 370 F.2d 171, 173 (9th Cir. 1966), cert. denied, 410 U.S. 916 (1973). Even in circuits where the majority rule is followed, trial judges have excluded the use of prior acquittals because of undue prejudice, and have been upheld by appellate courts. See, e.g., United States v. Martinez, 744 F.2d 76 (10th Cir. 1984).

19. Most courts have ruled that a jury must be informed of the defendant’s acquittal of the extrinsic offense. See, e.g., Phillips, 401 F.2d at 305 ("admitting the [extrinsic offense] evidence without informing the jury of the acquittal, was clearly erroneous"); State v. Bernier, 491 A.2d 1000, 1005 (R.I. 1985) ("the better rule ... [is] to allow evidence of the acquittal either by stipulation, by the parties' testimony, or by an instruction from the trial [judge]").

20. The doctrine of collateral estoppel means that when an issue of ultimate fact is settled by a valid final judgment, it may not be relitigated by the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436, 443 (1970). Unlike res judicata, which bars a new trial arising from the same facts, see J. FREEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 615 (1985), collateral estopped does not foreclose all future litigation; collateral estoppel only prevents relitigation of issues previously decided. See id. at 658.

Ultimate facts are those facts which must be proved to convict the defendant; they are the "sine qua non" of the charge. People v. Acevedo, 69 N.Y.2d 478, 486, 508 N.E.2d 665, 670, 515 N.Y.S.2d 753, 759 (1987). These include, but are not limited to, the statutory elements of the crime. Evidentiary facts, on the other hand, are "[t]hose facts which are necessary for determination of the ultimate facts; they are the premises upon which conclusions of ultimate facts are based." BLACK'S LAW DICTIONARY 500 (5th ed. 1979). For an excellent discussion of the distinction between evidentiary and ultimate facts in prior acquittal cases, see Acevedo, 69 N.Y.2d at 486, 508 N.E.2d at 670, 515 N.Y.S.2d at 759.

21. 397 U.S. 436, 443-46 (1970). In Ashe, the Supreme Court interpreted the fifth amendment double jeopardy clause to include the doctrine of collateral estoppel. Thus, the double jeopardy clause prohibits not only retry the defendant for the same offense, but also prohibits relitigating an ultimate fact in a subsequent trial when that fact was necessarily found for the defendant in the earlier trial. See infra notes 81-90 and accompanying text for further discussion of Ashe.

22. See, e.g., State v. Fielders, 124 N.H. 310, 314, 470 A.2d 897, 900 (1983) ("We refuse to expand the perimeters of ... Ashe v. Swenson ... to allow collateral estoppel to bar the relitigation of an 'ultimate' fact ... which ... is now only an 'evidentiary' fact ... ").

23. See, e.g., United States v. Van Cleave, 599 F.2d 954, 957 (10th Cir. 1979) ("Evidence of another crime, otherwise competent, is not necessarily rendered inadmissible by the fact that the
in Alabama, Alaska, Arkansas, California, Idaho, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Washington, and Wyoming. As of this writing, the Fourth, Eighth, Ninth, and Tenth Circuits, and the United States Court of Military Appeals, continue to hold this view.

accused was acquitted of such charge.

24. See Ex parte Bayne, 375 So. 2d 1239 (Ala. 1979) (implicitly recognizing admissibility of prior acquittal while allowing defendant to inform jury of disposition).


35. Patterson v. State, 96 Ohio St. 90, 117 N.E. 169 (1917).


42. United States v. Van Cleave, 599 F.2d 954, 957 (10th Cir. 1979); United States v. Addington, 471 F.2d 560 (10th Cir. 1973); United States v. Burkart, 458 F.2d 201 (10th Cir. 1972).

One issue conspicuously absent from the admissibility rulings of federal courts is the possible violation of double jeopardy. Unlike jurisdictions which exclude prior acquittals, federal courts that follow the majority rule have not wrestled with the constitutional issues presented by the admission of prior acquittals. These courts view Rule 404(b) as an inclusive rule, meaning that the lack of language excluding prior acquittals dictates their inclusion in most circumstances.

State courts which have considered the double jeopardy issue reject the application of collateral estoppel as applied in Ashe. The Wyoming and New Hampshire Supreme Courts, for example, have ruled that an acquittal in the prior trial establishes only that the government could not prove guilt beyond a reasonable doubt. The prior acquittal is therefore admissible because in the instant trial the standard of proof is lower since the issue is admissibility, not guilt. In federal court the government need only introduce sufficient evidence to support a finding by the jury that the defendant committed the extrinsic offense. Some states require the government to prove the commission of the extrinsic offense with clear and convincing evidence.

B. The Minority View: Issues Decided for the Defendant by the Prior Jury are Never Admissible

The Fifth Circuit was the first circuit to break with the majority rule, extending the Ashe doctrine of collateral estoppel to the use of prior crimes evidence. In Wingate v. Wainwright, Donald Wingate was charged with robbing a store on July 9th, 1968. The government introduced testimony from Joseph Hellman that his store was robbed...

44. These courts do not even explain their reasons for rejecting challenges to the admission of prior acquittals. Apparently as a concession to opponents of the majority view, the Seventh Circuit held that judges must inform the jury of the acquittal to counterbalance the prejudicial impact of this evidence. See United States v. Phillips, 401 F.2d 301, 305 (7th Cir. 1968).
45. United States v. Rocha, 553 F.2d at 616.
48. This view has been labeled the "relative burdens of proof" argument. Note, supra note 9, at 200-01. See State v. Smith, 532 P.2d 9, 10 (Or. 1975) ("Acquittal establishes only that a jury did not find the defendant to have been proved guilty beyond a reasonable doubt of the offense charged. To be admissible, however, evidence of other conduct need not be established beyond a reasonable doubt.") (footnote omitted). For a critique of this argument, see infra notes 135-54 and accompanying text.
50. See, e.g., State v. Holman, 611 S.W.2d 411, 412-13 (Tenn. 1981) ("it must be shown by 'clear and convincing evidence' that the prior crime was committed and that it was committed by the defendant on trial").
by Wingate on December 11, 1967 and again on January 2, 1968. James Angel testified that his store was robbed by Wingate on December 23, 1967. Wingate objected to this testimony on the ground that he had been tried and acquitted of robbing Hellman and Angel. The Fifth Circuit ruled that the doctrine of collateral estoppel prohibits relitigating an ultimate fact from a prior proceeding, which resulted in an acquittal, as an evidentiary or ultimate fact in a subsequent proceeding. The *Wingate* rule is thus: issues of ultimate fact, necessarily decided by a prior jury for the defendant, cannot be relitigated by a subsequent jury.

The District of Columbia, First, Second, Third, Seventh, and Eleventh Circuits have followed the Fifth Circuit's lead. Several

52. *Id.* at 210.
53. For the definition of "evidentiary" and "ultimate" facts, see *supra* note 20. The court in *Wingate* expressly rejected the claim that *Ashe v. Swenson*, 397 U.S. 436 (1970), should apply only in cases where an ultimate fact from a prior acquittal is being used to prove an ultimate fact in the instant trial. *Wingate*, 464 F.2d at 213. Some jurisdictions and commentators still hold that *Ashe* only prohibits using ultimate facts in this manner, and that *Ashe* is therefore not a bar to the use of prior acquitted crimes to establish evidentiary facts in the subsequent proceeding. See, e.g., United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir. 1972) (under *Ashe*, collateral estoppel applies only where an ultimate fact from the prior acquitted crime is "an essential element of the second charge"), cert. denied, 410 U.S. 916 (1973); Note, *Extension of Collateral Estoppel to Evidence from a Prior Acquitted Crime*, 35 MERCER L. REV. 1419, 1432 (1984) (under *Ashe*, collateral estoppel applies where an ultimate fact from the first proceeding is "being relitigated as [an] ultimate fact[] in the second proceeding").
54. *Wingate*, 464 F.2d at 212.

One commentator has listed the First Circuit as following the majority rule. *See Note, supra* note 53, at 1425. The case cited by the commentator to support the categorization is Benson v. Superior Court, 663 F.2d 355 (1st Cir. 1981). *Note, supra* note 53, at 1425 n.46. In *Benson*, Massachusetts prosecuted Benson for conspiracy to commit arson. Benson previously had been acquitted of a different arson charge arising out of the same facts. Benson sought to bar the government from relitigating the facts and issues necessarily determined in his favor at the prior trial. The court ruled that it was too early to step in and protect the defendant because "there [was] no way of knowing how the state will try to marshal its evidence and what points it will try to prove." *Benson*, 663 F.2d at 360. This case does not support inclusion of the First Circuit in the majority view group. First, it was not a prior acquittal arising out of a separate set of facts. This case was nearly identical to *Ashe*. Second, the court never decided whether the prior acquitted crime could be admitted. In fact, language in the opinion implies that the court agreed with the defendant that the issues in the prior case could not be relitigated. *See id.* at 360 (recognizing that collateral estoppel can bar "relitigation of specific facts and issues necessarily found in a defendant's favor at a previous trial") (citations omitted).
59. United States v. Castro, 629 F.2d 456 (7th Cir. 1980).
60. United States v. Hogue, 812 F.2d 1568 (11th Cir. 1987); Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984).
states also accept the Fifth Circuit's holding, although not necessarily its reasoning, including Arizona, Florida, Georgia, Illinois, Kentucky, Minnesota, Montana, Nevada, New York, Tennessee, Texas, and Virginia. Although the Kansas Supreme Court's holding in *State v. Irons* is consistent with the minority rule, language in the court's opinion suggests that it will follow the Sixth Circuit's approach.

C. The Sixth Circuit's Modified Approach

The Sixth Circuit has adopted a "modified approach"77 which prohibits the introduction of certain prior acquittals, but admits more prior acquittals than the *Wingate* standard. In *Oliphant v. Koehler*,78 the Sixth Circuit ruled that to exclude a prior acquitted crime under the doctrine of collateral estoppel; defendants must prove that the same exact issue the government seeks to establish through the prior acquittal is one the prior jury considered and decided in the defen-

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61. The various rationales used by these jurisdictions to exclude prior acquittals are discussed infra notes 81-154 and in accompanying text.
62. Although the reference to a prior acquittal was the basis of a reversal in *State v. Kerwin*, 133 Vt. 391, 394-95, 340 A.2d 45, 47-48 (1975), Vermont is not included in this list. It is unclear from reading *Kerwin* whether prior acquittals are inadmissible in Vermont. The court's decision could be based on the reference to a prior criminal act which was irrelevant to the instant charges, and thus inadmissible under Vermont's version of Rule 404(b).
64. *State v. Perkins*, 349 So. 2d 161 (Fla. 1977).
75. *Id. at 142, 630 P.2d at 1120.* For a discussion of the Sixth Circuit's approach, see infra notes 77-80 and accompanying text.
76. *Note, supra note 53, at 1439.*
77. *594 F.2d 547 (6th Cir.), cert. denied, 444 U.S. 877 (1979).*
When the government uses the prior acquittal to prove a different issue, the evidence is admissible.

The key difference between the Sixth Circuit's modified approach and the minority view is that the modified approach requires that the prior jury have expressly considered the issue the government now seeks to prove before a prior acquittal can be ruled inadmissible. While the minority view focuses on the facts litigated before the prior jury, the modified approach focuses on the issue the government seeks to prove through the prior litigated facts. For example, if the government seeks to introduce a prior acquittal to show a scheme or plan, the modified approach will exclude the prior acquittal only if the prior jury explicitly found that the defendant had no such scheme or plan. Thus, even though the prior jury found the defendant not guilty of the crime charged, the Sixth Circuit's approach allows the government to present the prior acquittal to a subsequent jury to show a scheme or plan to commit the instant crime.

II. PRIOR ACQUITTED CRIMES SHOULD BE TREATED DIFFERENTLY THAN PRIOR CONVICTIONS UNDER RULE 404(b)

The majority view treats prior acquitted crimes as it would any other extrinsic offense. However, federal and state courts have articulated a number of reasons for not admitting prior acquitted crimes under Rule 404(b). These courts have based their objections on the double jeopardy clause, due process (fundamental fairness) grounds, and the federal rules' strict demand for relevant evidence that is not unduly prejudicial.

A. The Use of Prior Acquitted Crimes to Demonstrate Guilt in the Instant Offense Violates the Double Jeopardy Clause

In Ashe v. Swenson, the Supreme Court combined two established theories of law to help expand double jeopardy protections: the fifth amendment's double jeopardy clause and the doctrine of collateral estoppel. Collateral estoppel had not previously been

79. *Id.* at 555. *See also* United States v. Johnson, 697 F.2d 735 (6th Cir. 1983) (reeffirming the Oliphant approach).
80. *See Oliphant*, 594 F.2d at 555.
82. "No person shall... be subject for the same offence to be twice put in jeopardy of life or limb." *U.S. Const.* amend. V. The double jeopardy clause is applied to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969).
83. Collateral estoppel was first developed in civil litigation and has been applied in criminal cases since United States v. Oppenheimer, 242 U.S. 85 (1916).
applied to the states because the Court did not consider it a constitutional requirement. In *Ashe*, the Court established collateral estoppel as a constitutional requirement imposed by the double jeopardy clause, noting that "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." In *Ashe*, the defendant was acquitted of robbing one participant in a six-player poker game, but was subsequently convicted of robbing a second player at the same poker game. The defendant argued that the principles of collateral estoppel contained within the double jeopardy clause of the fifth amendment prohibited the second conviction. The Court agreed, observing that although Missouri could have charged the defendant with six separate offenses and imposed six punishments upon conviction, once a jury determined that the defendant was not one of the robbers, the state could not relitigate that issue before a new jury. The Court found Missouri's actions to be the equivalent of retrying the defendant, albeit with a different victim.

Based on *Ashe*, admitting evidence of a defendant's prior acquitted crime violates the principles embodied in the double jeopardy clause. *Ashe* stands for the proposition that issues necessarily decided for a defendant in a prior proceeding cannot be relitigated. Introducing the prior acquitted crime allows, if not encourages, the jury to retry the defendant. Defendants are thus forced to reestablish their innocence because juries often view evidence of a prior offense as proof of guilt in the instant offense. Such a result strikes at the foundation of the double jeopardy clause.

84. *Ashe*, 397 U.S. at 445-46 (citations omitted).
85. *Id.* at 446.
86. *Id.*
87. See infra notes 117-22 and accompanying text.
90. The Supreme Court has explained the policy underlying the double jeopardy clause as follows:
'The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' United States v. Jorn, 400 U.S. 470, 479 (1971) (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).
Relying on *Ashe*, several jurisdictions have held the admission of prior acquitted crimes to be double jeopardy violations. In *United States v. Mespoulede*, the defendant was charged with possession of cocaine on January 31, and conspiracy to distribute cocaine. The jury acquitted the defendant of possession, but was unable to reach a verdict on the conspiracy count. At a second trial on the sole charge of conspiracy, government witnesses testified that the defendant had possessed cocaine on January 31, and the jury convicted him on the conspiracy charge. The Second Circuit Court of Appeals reversed, finding that the doctrine of collateral estoppel precluded admitting the evidence of the defendant’s cocaine possession on January 31. The court reasoned that the defendant’s conviction was due largely to the jury’s belief that he had possessed cocaine on January 31. Thus, although the defendant was previously acquitted of cocaine possession on January 31, he was compelled to prove once again that he did not possess cocaine on January 31 in violation of the double jeopardy clause.

Although *Mespoulede* involved a retrial arising from the same set of facts (but different charges), the rationale is equally applicable to cases involving separate transactions. For example, in *Blackburn v. Cross*, the defendant was charged with breaking and entering and sexual assault. The victim had only seen the profile and back of her assailant. At trial, the government presented the testimony of another resident in the victim's apartment complex, who claimed that the defendant once broke into her apartment and sexually assaulted her. Although the defendant had been acquitted of assaulting the other resident, the trial court admitted her testimony as "evidence of a similar offense tending to establish the identity of the [defendant] as [the victim's] assailant." The Fifth Circuit held that admitting the prior acquittal violated the double jeopardy clause and reversed the defendant’s conviction. As in *Mespoulede*, admitting the testimony forced the defendant to again prove he did not enter the other resi-

91. 597 F.2d 329 (2d Cir. 1979).
92. *Id.* at 332.
93. *Id.* at 332-35.
94. *Id.* at 335.
95. *Id.*
96. 510 F.2d 1014 (5th Cir. 1975).
97. However, she identified the defendant at a lineup as her assailant. *Id.* at 1016.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* The Court in *Blackburn* relied on Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972).
dent's apartment and rape her. Whether the prior crime arose from the same set of facts or not is irrelevant: the double jeopardy violation is identical.

Some courts have held that Ashe applies only to subsequent prosecutions based on the same transaction or set of facts, and only when the government is attempting to prove an ultimate fact in the instant trial which the prior jury rejected as an ultimate fact. These courts are incorrect. “[N]either the language of the courts in applying the doctrine of collateral estoppel nor a common sense consideration of the purposes of the double jeopardy clause support this position.”

The doctrine of collateral estoppel embodied in the double jeopardy clause bars all litigated ultimate facts from being relitigated in a subsequent trial, regardless of whether these facts serve as evidentiary or ultimate facts in the subsequent trial. The violation of the double jeopardy clause is in no way lessened by the use of the prior acquitted crime in an evidentiary rather than in an ultimate fact capacity.

B. Forcing a Defendant to Defend Against a Charge of Which the Defendant was Previously Acquitted Violates Fundamental Fairness

Courts need not accept Wingate’s double jeopardy analysis to conclude that admitting prior acquittals violates a defendant’s constitutional rights. In State v. Perkins, the Supreme Court of Florida held

102. By admitting in closing argument that although the victim's identification was not the best, but that it was “nailed down” when combined with the other resident’s testimony, the prosecutor ensured that the defendant would have to reestablish his innocence to the other charge. Blackburn, 510 F.2d at 1019 n.4.

103. This has been the view of the courts which have ruled that collateral estoppel bars prior acquittals from being introduced under Rule 404(b). See, e.g., Wingate, 464 F.2d at 213-14; Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984); United States v. Johnson, 697 F.2d 735 (6th Cir. 1983); United States v. Keller, 624 F.2d 1154 (3d Cir. 1980).

104. See, e.g., United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir. 1972), cert. denied, 410 U.S. 916 (1973); Note, supra note 9, at 196-97.

105. Wingate, 464 F.2d at 213 (commenting on the trial court’s approach).

106. In Ashe v. Swenson, 397 U.S. 436 (1970), the Court held that if “a[n] 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.” Id. at 443.

107. The Fifth Circuit observed:
We do not perceive any meaningful difference in the quality of “jeopardy” to which the defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of “ultimate” fact or merely an “evidentiary” fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial.

Wingate, 464 F.2d at 213-14.

108. 349 So. 2d 161, 163 (Fla. 1977).
that prior acquitted crimes are always inadmissible on fundamental fairness grounds, while expressly rejecting the defendant's double jeopardy claim.\textsuperscript{109} The court in \textit{Perkins} based its fundamental fairness ruling on the holding in \textit{Wingate}, where the Fifth Circuit found that:

\begin{quote}
[i]t is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime. Wingate was charged with robbing Hellman and Angel and as a result of those charges he endured the perils of trial. He was acquitted of those very charges and that should end the matter.\textsuperscript{110}
\end{quote}

The validity of Florida's position is demonstrated by comparing \textit{Perkins} to \textit{Loper v. Beto},\textsuperscript{111} a United States Supreme Court fundamental fairness decision.\textsuperscript{112} In \textit{Loper}, the Court ruled that a state may not use prior uncounseled convictions for the limited purpose of impeaching a defendant.\textsuperscript{113} If this use of prior convictions is fundamentally unfair, using a prior acquitted crime to prove an element of another crime is grossly unfair.\textsuperscript{114} Since the defendant in \textit{Loper} was convicted of the prior charge, the majority rule's admission of prior acquitted crimes is exponentially more prejudicial.

Another source of unfairness stems from prosecutorial zealfulness. In \textit{Ashe v. Swenson},\textsuperscript{115} the Court noted that the government improved its strategy at the second trial by not calling a witness whose identification testimony was "conspicuously negative" during the first trial, and that the witnesses who did testify again were much surer of their identification. It is repugnant to the principles symbolized by the dou-

\begin{footnotes}
\footnote{109} Id. Although dismissing the theory, the court's rhetoric supports the view that admitting prior acquittals violates the double jeopardy clause. For example, the court explained that allowing such evidence violated fundamental fairness because "to the extent that evidence of the acquitted crime tends to prove that it was indeed committed, the defendant is forced to reestablish a defense against it." \textit{Perkins}, 349 So. 2d at 163. Though the words are different, this is the principle embodied in the double jeopardy clause.

\footnote{110} \textit{Wingate}, 464 F.2d at 215, \textit{quoted in Perkins}, 349 So. 2d at 163.

\footnote{111} 405 U.S. 473 (1972).

\footnote{112} The Minnesota Supreme Court also has found that the admissibility of prior acquittals violates fundamental fairness. In State v. Wakefield, 278 N.W.2d 307 (Minn. 1979), the court held that once a defendant has been tried and acquitted, he is innocent and "in the interest of fairness and finality . . . [should] no more [have] to answer for his alleged crime." \textit{Id.} at 308.

\footnote{113} \textit{Loper}, 405 U.S. at 483.

\footnote{114} See United States v. Mespoulede, 597 F.2d 329, 335 n.9 (2d Cir. 1979).

\end{footnotes}
ble jeopardy clause to allow a prosecutor to perfect the government’s case against a defendant and retry the matter under the guise of other crimes evidence.\textsuperscript{116}

\textbf{C. The Relevancy of Prior Acquitted Crimes is Always Outweighed by the Prejudice They Engender}

Juries give prior convictions immense weight, and the prejudice engendered by revelations of past criminal conduct is nearly insurmountable.\textsuperscript{117} "[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality. This is true regardless of the care and caution employed by the court in instructing the jury."\textsuperscript{118}

The method of introducing prior acquitted crimes heightens the prejudicial impact an acquitted crime would otherwise carry. The jury is not informed of the defendant's prior charge through certified court documents. Instead, the prosecution subpoenas the alleged prior victim. The jury thus sees two victims pointing accusatory fingers at the defendant, although one jury has already determined that one finger points unjustly.\textsuperscript{119} The adage "where there’s smoke there’s fire" be-

\begin{itemize}
\item \textsuperscript{116} As stated by the New York Court of Appeals, "where the People have had a full and fair opportunity to contest issues, but have failed, it would be inequitable and harassing to again permit the prosecution to establish these same matters, as if the first trial had never taken place." People v. Acevedo, 69 N.Y.2d 478, 485, 508 N.E.2d 665, 670, 515 N.Y.S.2d 753, 758 (1987) (citation omitted).
\item Repugnant or not, however, it is not a rare occurrence. See, e.g., United States v. Mespoulede, 597 F.2d at 332 (government’s presentation of witnesses changed at a subsequent trial “doubtless because Amy Bonk had proved less than a wholly convincing witness’’ at the previous trial); Wingate v. Wainwright, 464 F.2d 209, 214 n.5 (5th Cir. 1972) (“the transcript of the testimony tending to establish Wingate’s guilt of other crimes is more than twice as long as the transcript of testimony tending to establish his guilt of the crime charged”).
\item Even though (1) the introduction of prior records is limited solely to impeaching the credibility of the defendant, (2) the judge admonishes the jury not to consider the defendant’s prior record as proof of guilt in the instant case, and (3) the prior conviction is sanitized (that is, the jury is not told the details of the prior conviction), juries still consider the defendant’s prior record in determining guilt. Allen, \textit{When Jurors are Ordered to Ignore Testimony, They Ignore the Order}, Wall St. J., Jan. 25, 1988, § 2, at 33, col. 2 (“They do the rational thing instead of the just thing.”). As the D.C. Circuit noted, “[t]o tell a jury to ignore the defendant’s prior convictions in determining whether he or she committed the offense being tried is . . . well beyond mortal capacities.” United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985).
\item There is, admittedly, a difference between a certified prior conviction and testimony about a prior crime of which the jury knows the defendant was acquitted. However, the net result is nearly identical. \textit{See infra} note 121.
\item United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972).
\item The prosecutor may join this chorus of accusers and rely on proof of the prior crime as a substitute for lack of evidence in the instant crime. See Wingate v. Wainwright, 464 F.2d 209, 214 n.5 (5th Cir. 1972) (prosecutor spent more time proving extrinsic offenses than proving instant crime).
\end{itemize}
gins taking a mental foothold in the collective psyche of the jury. If the defendant cannot again disprove the prior crime, the jury is very likely to return a guilty verdict. This is particularly true where the defendant was acquitted of the prior crime because "the jury may feel that the defendant should be punished for [that] prior activity even if he is not guilty of the offense charged." Admittedly, however, this is not sufficient reason to exclude evidence of prior acquitted crimes since most government evidence is prejudicial. The precise question is whether prior acquitted crimes can be relevant.

Under Rule 404(b), other crimes evidence is admissible only if it proves something other than the defendant's bad character, such as plan, intent, motive, or identity. And, as with all other evidence, such evidence is admissible only if it also passes the relevance test under Rule 402. Relevance depends upon two factors: materiality and probative value. That prior crimes are material to the instant crime is a given, else they would be inadmissible under the provision of Rule 404(b). It is also true that prior crimes are usually probative of the proposition they are offered to prove. Wigmore pointed out that the problem with evidence of extrinsic offenses, of which the defendant was convicted, is not a lack of relevance, but rather too much relevance. However, the probative value of an extrinsic offense is di-

120. Lawyer Gerry Spence has pointed out that even before an extrinsic offense is introduced, the defendant is already prejudged guilty:

[T]he constitutional guarantees of the citizen are just so much sloganeering for the politicians on the Fourth of July. If the prosecutor charges you with a crime, you're guilty already. We believe in each other's guilt, not in our innocence—none of us are innocent . . . . [A]s soon as the prosecution charges us it is not that we are presumed innocent under the Constitution. It is that we have been caught, finally.

G. SPENCE, GUNNING FOR JUSTICE 429 (1982).

121. See United States v. Mespoulede, 597 F.2d 329, 335 (2d Cir. 1979) ("criminal sanctions . . . realistically, may be imposed in large part because the second jury is persuaded that [the defendant committed the prior act]"); State v. Perkins, 349 So. 2d 161, 163 (Fla. 1977) (noting that the defendant must defend against the prior charge because of "the prejudicial effect the evidence of the acquitted crime will have in the minds of the jury in deciding whether he committed the crime being tried"); State v. Wakefield, 278 N.W.2d 307, 308 (Minn. 1979) ("[t]here is too great a chance that the jury will punish for past crimes even if uncertain about present ones").


123. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

124. MCCORMICK ON EVIDENCE § 185, at 541 (3d ed. 1984).

125. 1A J. WIGMORE, EVIDENCE § 58.2, at 1212 (Tillers rev. 1983) ("It may also be said that it is because of the indubitable relevancy of specific bad acts showing character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much.").
minished when the defendant is acquitted because its probative value often depends on the defendant’s guilt of the prior crime.\textsuperscript{126} "If the [other crimes] evidence is false, it cannot support the inference for which it is offered.'\textsuperscript{127}

The concept that "mere charges, accusation, and arrest are consistent with innocence'\textsuperscript{128} undermines the logic of courts which argue that even though the defendant was acquitted of the prior crime, the prior acquittal's relevance is overwhelming.\textsuperscript{129} Their position is akin to former Attorney General Meese's cynical proclamation that police officers arrest only the guilty.\textsuperscript{130} Such a premise should be rejected because "it is a basic tenet of our jurisprudence that . . . [i]n the eyes of the law the acquitted defendant is to be treated as innocent.'\textsuperscript{131}

Because the relevance of an extrinsic offense is often fatally undermined by an acquittal of that offense, prior acquitted crimes should almost always be excluded under Rule 403.\textsuperscript{132} However, even if a court finds that the prior acquittal has some limited relevance, the relevance must be substantial to outweigh the prejudice which other crimes evi-

\textsuperscript{126} Specific examples of how extrinsic offenses lose their relevance when the defendant is acquitted are discussed infra notes 178-238 and in accompanying text.

\textsuperscript{127} Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 59 Notre Dame L. Rev. 556, 564-65 (1984). This is implicitly obvious. "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Huddleston v. United States, 108 S. Ct. 1496, 1501 (1988) (citation omitted). A second jury should not be allowed to overrule the first jury's acquittal by concluding that the defendant was the actor. See United States v. Dowling, 855 F.2d 114, 122 (3d Cir. 1988), cert. granted, 109 S. Ct. 1309 (1989); Moore v. State, 254 Ga. 674, 677, 333 S.E.2d 605, 608 (1985).


\textsuperscript{129} See, e.g. United States v. Moore, 522 F.2d 1068 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976). In Moore, the court admitted that the prior acquittal may be prejudicial, but it upheld the trial judge's decision because the prior acquittal was probative of the issue of knowledge and intent. The defendant was charged with conspiracy to steal from a naval installation. At trial, some testimony implicated the defendant in a separate conspiracy to steal from another naval installation, a charge of which the defendant had been acquitted. Nevertheless, the Ninth Circuit ruled that the prior acquittal demonstrated that the defendant "acted with knowledge and intent." Id. at 1079. In other words, the defendant's alleged participation in the prior conspiracy demonstrated that he was actively involved in the instant conspiracy and was not an innocent bystander. The court is correct in its relevance analysis only if the defendant committed the prior theft. Since the court did not inquire into the prior jury's findings, however, it is unclear whether the prior jury determined that the defendant did not participate in the earlier conspiracy. Thus, the relevance of the prior acquittal is unclear.


\textsuperscript{131} State v. Wakefield, 278 N.W.2d 307, 308 (Minn. 1979).

\textsuperscript{132} See State v. Little, 87 Ariz. 295, 307, 350 P.2d 756, 763 (1960) ("The fact of an acquittal, we feel, when added to the tendency of such evidence to prove the defendant's bad character and criminal propensities, lowers the scale to the side of inadmissibility of such evidence.").
dence carries. Moreover, in light of the prejudicial impact of such
evidence, prosecutors may have a duty to avoid using prior acquit-
tals. Moreover, in light of the prejudicial impact of such
evidence, prosecutors may have a duty to avoid using prior acquit-
tals.  

D. "Relative Burdens of Proof" Rationale Does Not Justify the Admissibility of Prior Acquitted Crimes

A popular argument made by opponents of Wingate and supporters
of the majority rule is the "relative burdens of proof" rationale. The argument rests on the claim that an acquittal does not establish innocence; it proves only that the government could not meet its bur-
den beyond a reasonable doubt. Thus, since the government need only present evidence from which a jury could find by a preponderance of
the evidence that the defendant committed a prior crime for this evi-
dence to be admissible under Rule 404(b), the government’s earlier
failure to meet the beyond a reasonable doubt standard does not pre-
clude admission of the evidence.

Advocates of this position claim that the Supreme Court has ap-
proved their argument in United States v. One Assortment of 89 Fire-
arms. In 89 Firearms, the government instituted forfeiture pro-
ceedings against the defendant, charging him with possessing fire-
arms for use in an unlicensed firearms business. The defendant had
been previously acquitted of knowingly engaging in the business of
dealing in firearms without a license, and argued that the acquittal
estopped the government from bringing the forfeiture action. The
Court disagreed, holding that the acquittal "merely proves the exis-
tence of a reasonable doubt as to [the defendant's] guilt." Because
the government only had to prove its forfeiture claims by a prepon-
derence standard, the Court ruled "that the difference in the relative

133. United States v. Phillips, 401 F.2d 301, 306 (7th Cir. 1968). The Tennessee Supreme Court
in State v. Holman, 611 S.W.2d 411 (Tenn. 1981), found that even if the extrinsic offense can be
proved, the defendant's acquittal of that crime makes it impossible for the government to meet its
burden of proving the prior crime with clear and convincing evidence. Id. at 413. Of course, this
argument is inapplicable in federal court since the government need only present "sufficient evi-
dence to support a finding by the jury that the defendant committed the similar act." Huddleston

134. "Prosecutors should content themselves with presenting competent, relevant evidence and
refrain from overkill, which as in the present case, prejudices a defendant’s right to a fair trial." Wingate v. State, 232 So. 2d 44, 46 (Fla. 3d DCA 1970) (Pearson, C.J., dissenting), cert. denied,

135. This Comment rebuts the formulation of the relative burdens of proof rationale as pre-
sented in Note, supra note 9, at 199-200.


138. Id. at 361.
burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.139

Opponents of Wingate view 89 Firearms as Wingate's death knell.140 First, they read 89 Firearms as rebutting Wingate's holding that collateral estoppel applies to the use of evidence in a subsequent trial regardless of whether it operates in an evidentiary or ultimate fact capacity. At a minimum, opponents claim, 89 Firearms means that collateral estoppel applies only when the prior acquittal is intended to establish an ultimate fact in the subsequent prosecution.141 Second, they read the 89 Firearms decision as establishing the general rule that if the standard for proving the disputed issue is lower in the subsequent proceeding than the standard applied in the earlier prosecution, collateral estoppel will not bar the admissibility of a prior acquittal.142 If its opponents are to be believed, Wingate and its progeny have been slain. Reports of Wingate's death, however, "are greatly exaggerated."143

There are fundamental flaws in the relative burdens of proof argument. Its most basic flaw results from a semantic approach to defendants' rights. Note how the claim that admitting prior acquittals results in a retrial of the defendant's guilt is rebutted: "[The] [e]vidence [of the prior acquitted crime] was not introduced for the purpose of retrying [the defendant] on the charge for which he had been acquitted."144 This argument misses the point. The introduction of prior acquittals results in retrying the defendant for the earlier crime, regardless of the purpose for which the prior acquittal is introduced.145 Opponents of Wingate claim that acquittals do not establish innocence. However, our judicial system treats an acquittal as a verdict of innocence.146 Although the evidence that a defendant committed the prior crime may sometimes pass the clear and convincing test,

it is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. In the eyes of the law the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime.

rests on technically logical reasoning, the analysis ignores human nature and concepts of justice.

Moreover, since 89 Firearms addressed the applicability of collateral estoppel to subsequent civil proceedings, opponents of Wingate cannot claim support from the 89 Firearms decision. An acquittal does not, and should not, immunize a defendant from civil liability. Concerning further criminal liability, however, the double jeopardy clause requires that the defendant be regarded as innocent. The Court's language is not easily extrapolated to the criminal arena. Because the rights at stake are much more fundamental and precious, they should not be equated with the monetary liability at issue in civil actions.

The advocates of the relative burdens of proof rationale settle for a preponderance standard to be the safeguard of defendants' rights. Even if the standard were clear and convincing, however, it would be insufficient to guarantee a fair trial. In re Winship requires that guilt be proved beyond a reasonable doubt. Yet, advocates of the relative burdens of proof rationale are willing to settle for a preponderance standard because the evidence purportedly does not go to establish an ultimate fact. In a very real sense, however, testimony about a non-ultimate fact is testimony about the ultimate facts necessary for a finding of guilt. Allowing highly prejudicial prior acquittals to determine a person's fate after passing only a preponderance test is of little comfort. The highly prejudicial nature of extrinsic offenses mandates a much higher standard, especially in view of the defendant's acquittal of the extrinsic offense.

147. State v. Wakefield, 278 N.W.2d 307, 308 (Minn. 1979) ("it is a basic tenet of our jurisprudence that ... [i]n the eyes of the law the acquitted defendant is to be treated as innocent").

148. See United States v. Mespoulede, 597 F.2d 329, 335 (2d Cir. 1979).

149. See White, Evidence of Other Crimes, Wrongs or Acts Under Federal Rule of Evidence 404(b): Some Unanswered Questions, 21 ATLA L. REP. 117, 120 (1978) ("It should be noted that 'clear and convincing' evidence is not as imposing a standard in practice as it sounds, since even the uncorroborated testimony of an accomplice has been held to satisfy that standard.").


151. See Kaplan, Character Testimony, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 157 (1985) ("[I]t makes little sense, psychologically, to separate the end product from its elements .... Testimony does not bear on a single element without bearing on its end product—the ascription of guilt.").

152. See supra notes 117-22 and accompanying text.

153. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.13, at 150 (2d ed. 1987) ("The telling impact of other-crimes evidence ... coupled with its high potential for inducing prejudice, justifies some special safeguards."). In fact, some courts have applied a beyond a reasonable doubt standard to other crimes evidence. See, e.g., United States v. Testa, 548 F.2d 847, 851 n.1 (9th Cir. 1977); Ernster v. State, 165 Tex. Crim. 422, 424-25, 308 S.W.2d 33, 34-35 (Crim. App. 1957).

154. The cases which have dealt with the standard of proof for Rule 404(b) evidence have not had prior acquittals at issue. See Huddleston v. United States, 108 S. Ct. 1496 (1988); United States v. Ingraham, 832 F.2d 229, 234-35 (1st Cir. 1987), cert. denied, 108 S. Ct. 1738 (1988).
III. THE MODIFIED APPROACH OF THE SIXTH CIRCUIT IS INSUFFICIENT TO PROTECT THE RIGHTS OF DEFENDANTS

In Oliphant v. Koehler, the Sixth Circuit ruled that prior acquittals must be excluded only if introduced to prove the same issue a prior jury rejected. In Oliphant, the defendant was accused of rape. He had been acquitted in two earlier trials of raping two other women. In the subsequent trial, the prosecution asserted that the defendant had orchestrated the events surrounding the instant rape. As in the previous trials, the defendant in the instant trial argued that the victim had consented to sexual intercourse. Because the issue of orchestrating a plan or scheme was not squarely before the prior jury, the Sixth Circuit admitted the prior acquittal. The court would only exclude the evidence if the first jury actually ruled on whether the defendant orchestrated the rapes.

The Sixth Circuit draws a false distinction. In Oliphant, the two prior juries found that the defendant did not rape his accusers. The orchestration claim in the subsequent trial assumes the defendant raped his two accusers, otherwise all he orchestrated were seductions. Although the prior jury did not rule explicitly on the orchestration claim, the Sixth Circuit distinction is semantic because the jury implicitly ruled on the claim. In acquitting the defendant of the prior rapes, those juries believed the defendant’s consent defense and implicitly rejected any orchestration theory. The relevancy of the prior acquittal to the instant case is thus vitiated. Since the defendant did not orchestrate the prior rapes, the prior acquittals are not relevant to proving the defendant orchestrated the rape in the instant case.

The standard suggested by the Sixth Circuit is inconsistent with protecting defendants’ double jeopardy rights. The “modified approach” ignores the possibility that a jury’s verdict implicitly rejects certain claims. Moreover, because the evidence of extrinsic offenses is often introduced in the subsequent trial to establish a different element than it established in the prior trial, this approach will not exclude many prior acquittals.

156. Oliphant, 594 F.2d at 555.
157. See infra notes 188-91 and accompanying text (arguing Oliphant was wrongly decided).
158. If the Sixth Circuit’s modified approach were used by courts which now follow Wingate, at least three cases would have been decided differently. See United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979) (although defendant was acquitted of possession charge, since the instant trial was for conspiracy to distribute, the first jury did not pass explicitly on the conspiracy claim); Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975) (although both first and second trial were for rape, first jury did not expressly pass on orchestration claim); State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960) (prior acquittal used at second trial to prove plan or scheme, and first jury could not have explicitly addressed question of plan or scheme).
IV. APPLICATION OF THE PROPER ADMISSIBILITY STANDARD FOR PRIOR ACQUITTED CRIMES

In light of the objections raised by various courts, the admissibility of evidence relating to crimes of which the defendant was acquitted should be severely restricted. The proper admissibility standard for prior acquittals is one which excludes mention of any issue previously litigated and decided in favor of the defendant. A defendant may invoke the doctrine of collateral estoppel as to any ultimate fact the first jury necessarily decided for the defendant.\footnote{159} This absolutist standard is vital to protect the rights of defendants.\footnote{160}

This standard, as developed in cases like \textit{Wingate v. Wainwright},\footnote{161} \textit{State v. Wakefield},\footnote{162} and \textit{State v. Perkins},\footnote{163} does not preclude the introduction of all prior acquittals. There are situations where some facts about a previous charge are relevant, where informing the jury of them would not engender undue prejudice, and where the facts were not ones which the jury necessarily found in favor of the defendant. Where these requirements are not met, however, the testimony should not be admitted into evidence.

\textbf{A. Courts Should Admit Evidence That Does Not Contradict a Prior Jury's Finding}

The admissibility standard adopted by the Fifth Circuit requires that a judge determine whether the issue the government seeks to prove was necessarily decided by the previous jury before excluding the testimony. If the issue was necessarily decided by the prior jury as an ultimate fact for the defendant, it cannot be relitigated in the in-

\footnote{159} Collateral estoppel requires a three-step process:
(1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was “litigated” in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.

\footnote{160} United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978).

\footnote{161} 464 F.2d 209 (5th Cir. 1972).

\footnote{162} 278 N.W.2d 307 (Minn. 1979).

\footnote{163} 349 So. 2d 161 (Fla. 1977).
stant trial. Conversely, if the prior jury's basis for acquittal was an issue other than that which the prosecution is trying to relitigate, collateral estoppel does not apply.

The burden of ascertaining what issues the prior jury decided is on the defendant. It is not a rigid burden, however, since the defendant need not prove there was no other possible issue on which the jury could have based its verdict. In Ashe v. Swenson, the Court urged judges not to apply the rule of collateral estoppel "with the hyper-technical and archaic approach of a 19th century pleading book." The Court warned that inquiries into a jury's prior findings "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Any more restrictive an application would amount to a rejection of the rule because only those people present during jury deliberations will ever know, with absolute certainty, the basis for the jury's verdict.

In practice, this mandate by the Supreme Court has meant that courts will not examine every possible explanation for the jury's verdict. Rather, courts look to the reasonable inferences which can be drawn from the verdict. To draw these inferences, courts examine the transcript of the prior trial. Where the trial court neglects to examine the transcript, an appellate court may remand the case so that a full transcript of the prior trial will be included in the record. Failure to provide the trial court with a transcript of the prior trial, however, bars the defendant from raising the issue of collateral estoppel on appeal.

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164. Wingate, 464 F.2d at 212.
165. The issue is "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id. (emphasis added). For this reason, if the prosecutor nolle prosses a case, collateral estoppel does not apply. Holland v. State, 466 So. 2d 207 (Fla. 1985). However, if a judge grants a motion for judgment of acquittal, thereby indicating that a reasonable jury could not return a verdict of guilty beyond a reasonable doubt based on the government's case, collateral estoppel should apply.
168. Id. (quoting Sealfon v. United States, 332 U.S. 575, 579 (1948)).
169. Id.
171. See Gragg v. State, 429 So. 2d 1204 (Fla.) (fact that jury might have exercised pardon power and returned verdict on lesser charges out of compassion does not allow the state to retry the issue on which defendant was acquitted), cert. denied, 464 U.S. 820 (1983).
172. See State v. Little, 87 Ariz. 295, 305, 350 P.2d 756, 762 (1960) (courts may look to reasonable inferences to be drawn from general jury verdicts).
175. See Smith, 446 F.2d at 202-03; United States v. Friedland, 391 F.2d 378, 382 (2d Cir. 1968).
Even if ascertaining the precise reason for the prior jury's verdict is difficult,\textsuperscript{176} the protections of collateral estoppel should not be withheld. Defendants who can pinpoint the issues decided by the prior jury should not be denied this protection merely because other defendants are unable to avail themselves of the same shield. Moreover, courts cited in this Comment generally had little difficulty determining the basis for the prior verdicts.\textsuperscript{177}

\section*{B. Acceptable References to Prior Acquitted Crimes}

The \textit{Wingate} rule only excludes evidence offered to prove issues necessarily decided by the prior jury in favor of the defendant. Evidence associated with a prior acquitted crime will be admissible where this evidence will not contradict the findings of the prior jury.\textsuperscript{178} A review of the recognized exceptions to Rule 404(b) will illustrate the circumstances under which prior acquittals are admissible. These recognized exceptions fall into four general categories.

\textbf{1. To Complete the Story}

Testimony regarding the context within which the charged crime occurred is admissible if relevant to contested issues in the trial. Such evidence may be relevant to "complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings."\textsuperscript{179} When the testimony includes criminal acts of which the defendant was acquitted, however, admissibility and relevance can be problematic.

In \textit{Polk v. State},\textsuperscript{180} the defendant was charged by separate informations with grand larceny of an automobile and robbery. Both charges arose out of the same set of facts. The government alleged that Polk

\begin{itemize}
  \item \textsuperscript{176} See United States v. Gonzalez, 548 F.2d 1185, 1192 (5th Cir. 1977) ("There are many possible reasons for the jury's verdict and without extrasensory perception, we cannot say that any one is necessarily inherent in the verdict.").
  \item \textsuperscript{177} An exception is the Sixth Circuit's decision in United States v. Johnson, 697 F.2d 735 (6th Cir. 1983), where the court remanded for the production of a trial transcript. In two other cases, United States v. Hicks, 24 M.J. 3 (C.M.A.), cert. denied, 108 S. Ct. 95 (1987), and Polk v. State, 252 Ark. 320, 478 S.W.2d 738 (1972), the courts noted that the defendant's collateral estoppel claim was insufficient because the defendant did not prove what specific facts the prior jury had necessarily found for the defendant.
  \item \textsuperscript{178} Prior acquitted crimes are not \textit{per se} inadmissible under the \textit{Wingate} rule. Other crimes evidence offered for a proper purpose under Rule 404(b) is inadmissible only if the relevance of the extrinsic offense depends on the defendant having committed the prior crime. If the second jury believes the testimony concerning the prior acts without rejecting the factual findings of the first jury, there is no admissibility problem.
  \item \textsuperscript{179} MCCORMICK ON EVIDENCE § 190, at 558 (3d ed. 1984).
  \item \textsuperscript{180} 252 Ark. 320, 478 S.W.2d 738 (1972).
\end{itemize}
robbled a filling station attendant, locked the attendant and a customer in a rest room, and left the scene by stealing the customer’s car.\textsuperscript{181} Polk was first tried and acquitted on the robbery charge. Subsequently, he was tried and convicted on the grand larceny charge. At the grand larceny trial, the government’s witnesses testified that Polk robbed the station and fled in a customer’s car, even though Polk had been acquitted of the robbery charge.\textsuperscript{182} The Arkansas Supreme Court held that the prior acquittal was properly admitted since Polk had failed to show on what basis the jury had acquitted him.\textsuperscript{183}

This type of testimony generally is inadmissible under the Wingate rule. To decide what prior acquitted acts witnesses may testify about, the judge must determine first what ultimate facts the prior jury necessarily decided. If Polk denied being at the filling station at the time in question, and the prior jury had to find that Polk was not present to acquit him, then the testimony about his presence at the station would be inadmissible in the second trial because that fact was already litigated.\textsuperscript{184} If, on the other hand, Polk admitted to being at the station but denied robbing the attendant, then the government witnesses would be permitted to testify only as to his presence. Since the prior jury would have found that Polk did not commit the robbery, under no circumstances should any witness be permitted to testify that Polk committed the prior robbery.\textsuperscript{185}

2. To Prove Scheme or Plan

Evidence of an extrinsic offense which shows the defendant was carrying out a scheme or plan is probative of the defendant’s guilt because if the defendant committed the other acts which are part of a

\textsuperscript{181} Id. at 321, 478 S.W.2d at 739.

\textsuperscript{182} Id. at 323, 478 S.W.2d at 740.

\textsuperscript{183} Id. at 322, 478 S.W.2d at 739. Such a showing is crucial. See supra notes 166-75 and accompanying text.

\textsuperscript{184} Contra King v. Brewer, 577 F.2d 435 (8th Cir. 1978), cert. denied, 440 U.S. 918 (1979). In King, the government was allowed to “impeach the defendant’s voluntary testimony consisting of a continuous narrative covering a large part of two days,” id. at 441, by introducing evidence that the defendant robbed a different laundry the day before the instant crime even though the defendant was acquitted of robbing the first laundry in a prior trial. The ability of the government to impeach the defendant’s story is questionable. The prior verdict does not necessarily mean the jury found that the defendant was not in that laundry that day. However, it does necessarily mean that the government cannot relitigate the issue of whether the defendant robbed the other laundry. Unless the prior jury had to find that the defendant was not in that laundry when it was robbed, the government could introduce witnesses to place the defendant at the other laundry, thus proving the defendant lied about his whereabouts. Collateral estoppel is not violated so long as the defendant is not accused of robbing the other laundry.

\textsuperscript{185} For an example of how testimony may be limited to facts not collaterally estopped by a defendant’s prior acquittal, see infra notes 211-13 and accompanying text.
scheme or plan which includes the instant crime, then the defendant is probably guilty.\textsuperscript{186} However, if the prior act which constitutes part of the overall scheme is a crime of which the defendant was acquitted, then the extrinsic offense generally is inadmissible.\textsuperscript{187}

In \textit{Oliphant v. Koehler},\textsuperscript{188} the defendant was charged with rape. Although he admitted having sexual intercourse with the victim, he maintained that she had consented. The government subpoenaed two women who claimed the defendant raped them after following a course of action similar to the one used in the instant rape. The government introduced the testimony of the two women to prove that the defendant had a scheme or plan to orchestrate the events leading up to the intercourse to make it appear as if his victims consented to the intercourse.\textsuperscript{189} The defendant had already been tried and acquitted of raping the two witnesses, whom the defendant also asserted had consented to intercourse.

The Sixth Circuit refused to apply collateral estoppel to the issue of whether the defendant had raped the two witnesses. The court held that unless the prior juries had considered the claims of orchestration, there was no relitigation of issues already decided. The court ruled that the prior juries could have found the defendant orchestrated the events surrounding the intercourse, but that the victim ultimately consented to his advances.

\textsuperscript{186} McCormick on Evidence § 190, at 559 (3d ed. 1984) ("[t]o prove the existence of a larger plan, scheme, or conspiracy of which the crime on trial is a part").

\textsuperscript{187} An exception to this general rule can be found in United States v. Davis, 809 F.2d 1194 (6th Cir. 1987), cert. denied, 107 S. Ct. 3234 (1987). In Davis, the defendant was charged with conspiracy to distribute illegal narcotics. To satisfy the overt act requirement of the conspiracy charge, the government introduced a prior charge of illegal narcotics distribution. The defendant had been acquitted of the prior charge due to entrapment. The Sixth Circuit admitted the testimony because the defendant's invocation of the entrapment defense meant he admitted committing the act of distributing narcotics. Since the overt act in a conspiracy case need not be illegal, \textit{id.} at 1206, the government's use of the prior acquittal did not contradict the prior jury's findings. The prior jury found that the defendant distributed narcotics. The government used that act, without reference to criminal intent, to establish a conspiracy. There was no violation of double jeopardy because the defendant was not required to reestablish his innocence, since it was never questioned. \textit{Id.}

\textsuperscript{188} 594 F.2d 547 (6th Cir.), cert. denied, 444 U.S. 877 (1979).

\textsuperscript{189} This orchestration consisted of getting the victims into the car voluntarily under the pretense of taking them to their destination. Using different excuses, all victims were instead taken to unfamiliar areas of town. Although the victims had opportunities to escape, they did not because the defendant acted so friendly. Once the defendant became violent, there was no longer any opportunity for escape. The victims were all told to submit or they would be injured in some way. None of the victims were beaten, nor were any of their clothes torn. The victims were then driven home. The defendant gave one victim his college identification card, and encouraged another to take down his tag number. Thus, the victims went to the police station alleging rape against a man they apparently knew. "Knowledge of defendant's name, address, college identification and car license numbers, along with other facts such as the lack of bruises and apparent opportunities to escape would tend to lessen the women's credibility when they told their story of rape." \textit{Id.} at 552.
The Sixth Circuit misapplied the *Ashe* rule. The court hypothesized what the jury could have found. Such hypothesizing violates the Supreme Court's edict against applying hypertechnical rules to collateral estoppel. What the prior juries did find was that the defendant's alleged victims had consented to intercourse. The only possible relevance of the prior alleged rapes would be to show that the defendant had a scheme by which he raped women. However, to prove such a scheme the government must prove the defendant actually raped the two witnesses. Since the defendant was acquitted of both charges, the two alleged rapes were irrelevant to the instant charge unless orchestration of consensual sex diminishes the defense of consent to the instant charge. Orchestration of consensual intercourse (seduction) is not a crime; only unconsensual intercourse is a crime. Thus, the Sixth Circuit allowed the claim of orchestrating rapes to be established by acts which were deemed not to have been rapes, and forced the defendant to again prove that the two witnesses consented to having sex with him.

3. To Prove Identity

There are several ways in which the identity of a defendant as a perpetrator can be established through evidence of extrinsic offenses. The identity of the defendant as perpetrator can be shown by (1) proving "other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused;" (2) establishing that the defendant has a propensity for the same unusual sexual relations which the perpetrator in the instant case displayed; (3) proving the defendant had the opportunity to commit the crime; or (4) proving the defendant had a motive for committing the crime. However, if the defendant was acquitted of the prior offense and relevance depends on the present jury's belief that the defendant committed the prior offense, the prior acquittal is inadmissible.

190. *See supra* notes 167-70 and accompanying text.
191. *See supra* note 127 and accompanying text.
192. *McCormick on Evidence* § 190, at 559 (3d ed. 1984) (footnote omitted). This exception is also known as *modus operandi* or the signature exception.
193. *Id.* at 560.
194. *Id.* at 563 ("in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged") (footnotes omitted).
195. *Id.* at 562.
196. *See Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975) (prosecutor collaterally estopped from presenting evidence that defendant attacked two other women in apartment complex because defendant was acquitted). *See also supra* note 127 and accompanying text. For a discussion of why *Blackburn* was correctly decided, see *supra* notes 96-103 and accompanying text.
Evidence of *modus operandi* almost always should be inadmissible because its only purpose is to prove the defendant has committed a nearly identical act in the past and, therefore, probably committed the instant crime. Once the defendant is acquitted of the prior act, no *modus operandi* has been established. In *United States v. Dowling*, the defendant was convicted of several offenses arising from a bank robbery. At trial, the government called a witness who testified that two weeks after the bank robbery at issue, she was robbed by a man "wearing a knitted mask with cut out eyes (of a different color than the one worn by the bank robber) and carrying a small handgun (which was similar to the black silvery gun used in the bank robbery)." Although the defendant already had been tried and acquitted of attempted robbery of the witness, the trial court admitted the testimony to show identity. The Third Circuit Court of Appeals held that since the prior jury necessarily decided that the defendant did not participate in the prior attempted robbery, "the constitutional doctrine of collateral estoppel included in the Fifth Amendment's double jeopardy clause" precluded the government from introducing the prior acquitted crime in the instant trial.

Propensity for unusual sexual relations is indicative of identity on the same theory as *modus operandi*. If the prior crime is an indication of the defendant's sexual proclivities, the testimony is highly relevant. If the unusual sexual relations occurred during the commission of a crime of which the defendant was acquitted, however, testimony about the defendant's sexual desires may be inadmissible.

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198. *Id.* at 116.
199. *Id.* at 120.
200. *Id.* at 120-21.
201. *Id.* at 120.
202. *Id.* at 120-22. The court also would have ruled the evidence inadmissible on other grounds. See *id.* at 122 (prior acquittal inadmissible under Huddleston v. United States, 108 S. Ct. 1496 (1988), since prior jury's determination that defendant did not commit prior crime means that subsequent jury cannot reasonably conclude that the prior crime was committed by the defendant); *id.* (trial court's failure to exclude evidence under Rule 403 was an abuse of discretion).

The court affirmed the defendant's conviction, however, because it concluded that the admission of the prior acquitted crime was harmless error. *Id.* at 122-24. In *Dowling*, the Supreme Court could limit or expand the scope of the harmless error doctrine articulated in *Chapman v. California*, 386 U.S. 18 (1967). However, the application of the harmless error doctrine to the introduction of prior acquitted crimes will not be addressed in this Comment.

203. A witness certainly could not testify about illegal sexual acts, such as sodomy, for which the defendant was tried and acquitted. Since consent is not a defense to such crimes, an acquittal means the defendant did not commit the act as defined by law. To use the prior charge of sodomy to prove the defendant enjoys sodomy would violate double jeopardy, because the defendant would have to reestablish that he did not commit the prior act.
In *Felker v. State*, the defendant was charged with rape and sodomy. Evidence of an extrinsic offense was introduced to prove identity. In the prior case, the defendant was convicted of aggravated sodomy, but was acquitted of rape. The court ruled that the conviction on the sodomy charge was proof that the prior jury believed the defendant was present when the victim was abused. The court then reasoned that although the prior jury believed the defendant's consent defense to the rape charge, it did not necessarily find that he did not commit all the acts of which he was accused. Thus, the court admitted the extrinsic offense to establish identity.

The court's approach in *Felker* demonstrates the proper application of the *Wingate* rule. In *Felker*, the government offered the extrinsic offense to show that the defendant had a propensity for unusual sexual relations. The defendant's prior acquittal based on a consent defense did not negate his participation in these unusual sexual relations. Thus, the court properly permitted the victim of the prior crime to testify that the defendant had participated in unusual sexual relations with her, without testifying that the relations were nonconsensual.

Any testimony by the prior victim that she did not consent to sexual relations with the defendant, however, would be inadmissible because the prior jury found for the defendant on the consent issue. Although the jury may believe the prior victim consented to the defendant's actions, this is not very prejudicial to the state. For example, if a defendant's wife were to testify about the defendant's penchant for sodomy, her consent to his actions would not diminish a victim's claim of rape and sodomy. In other words, it is unlikely that a jury would believe that because the defendant's prior partner may have consented to his wishes, every woman he has sexual relations with thereafter will be presumed to have similarly consented. Limiting the testimony of a witness to issues which the prior jury did not necessarily decide is a legitimate way to protect the interests of the government and the defendant.

In *Jackson v. State*, the Supreme Court of Florida affirmed a trial court's admission of evidence relating to a prior crime of which the defendant was acquitted. The defendant was charged with first-
degree murder of a police officer.\textsuperscript{208} When the police officer placed the defendant in the police car, the defendant shot the officer with a gun that the defendant apparently had hidden. The defendant then ran from the area and eventually caught a taxicab. While the defendant was in the cab, the driver discovered the gun and struggled to take it away from the defendant, eventually throwing it out of the cab. Allegedly, the defendant retrieved the gun and shot at the cab driver through the cab’s rear window.\textsuperscript{209} Prior to being tried for shooting the police officer, the defendant was tried and acquitted of the attempted murder of the cab driver.\textsuperscript{210}

The cab driver was allowed to testify at the subsequent trial that the defendant had been in his cab on the day of the police officer’s murder, that they struggled for a gun, and that the cab driver threw the gun out the window.\textsuperscript{211} “No testimony was allowed concerning the alleged shooting or concerning the facts of the alleged crime of which appellant was acquitted.”\textsuperscript{212} This limitation on the cab driver’s testimony illustrates the proper application of the \textit{Wingate} rule since the cab driver was not allowed to testify about any facts which the prior jury found in favor of the defendant.

Another way to establish a defendant’s identity is to prove the defendant’s opportunity to commit the crime.\textsuperscript{213} Opportunity can be established through reference to a prior criminal act. If the defendant was acquitted of the prior act, however, admissibility is questionable. Such testimony is inadmissible if the jury must relitigate the issue of guilt in the prior crime for the prior act to become relevant.\textsuperscript{214}

For example,\textsuperscript{215} suppose a defendant is charged with forging endorsements on checks stolen from YMCA mailboxes. Since the defendant’s name does not appear anywhere on the checks, the government attempts to convince the jury that the defendant was the forger of the checks at issue by proving that the defendant had the opportunity to seize the checks. To prove that the defendant had access to the YMCA

\textsuperscript{208} Id. at 408.
\textsuperscript{209} Id. at 409.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 409-10.
\textsuperscript{212} Id at 410.
\textsuperscript{213} Since this exception relies on proving opportunity through presence at the scene of the crime, or through demonstrating any special abilities of the defendant, it is similar to the “complete the story” exception and the signature exception. See \textit{supra} notes 179, 192 and accompanying text.
\textsuperscript{214} Another reason for excluding the testimony would be that the same point can be established with different, less prejudicial, evidence. \textit{McCorMICK ON EVDENCE} § 190, at 565 (3d ed. 1984).
\textsuperscript{215} This example is drawn from the facts of United States v. DeJohn, 638 F.2d 1048 (7th Cir. 1981), where the defendant’s prior acts were uncharged.
mailbox, the government calls two witness, a YMCA security guard and a city police officer. The two witnesses testify that the defendant previously had been apprehended for stealing mail from YMCA mailboxes, although the defendant previously had been acquitted of that charge. Such evidence is relevant and admissible. The admissibility of the prior acquittal would depend on the grounds for the acquittal and on what facts the prior jury found in the defendant's favor.

If the defendant's sole defense in the prior case was that the two officers were mistaken, then the prior jury would have necessarily decided that the defendant did not remove mail from the YMCA mailboxes. The testimony of the two officers in the subsequent case, therefore, would be inadmissible because the prior jury would have rejected their story. To reintroduce their testimony would force the defendant to again prove his innocence of the prior crime.

On the other hand, if the defendant's defense in the prior case was that he did not actually remove any of the contents from the mailboxes because he changed his mind after opening the boxes, evidence of the prior crime would be admissible. In this situation, the prior jury would not necessarily have found that the defendant did not enter the mailboxes. The jury could have accepted the defendant's testimony that he did not steal any mail, and also accepted the government's testimony that he did open the boxes. Thus, the instant jury could find that because the defendant had access to the mailboxes, he had the opportunity to commit the crime in the instant case. Such a jury finding would not contradict the prior jury's finding.

Proving the defendant had a motive for committing the crime is also probative of the defendant's identity. The admissibility of testimony regarding motive will depend on whether the motive stems from a crime of which the defendant was acquitted. In State v. Paradis, the defendant was charged with aiding and abetting the murder of Kimberly Palmer after previously having been acquitted of murdering Palmer's fiancé. The defendant allegedly had murdered Palmer's fiancé and then murdered Palmer. Testimony regarding the killing of Palmer's fiancé was admitted to prove that the defendant had a motive to kill Palmer—to prevent her from identifying her fiancé's murderer.

Although the Idaho Supreme Court rejected the Fifth Circuit's interpretation of Ashe v. Swenson, it nevertheless applied the Wingate
rule appropriately. The court noted that the basis for the prior jury’s acquittal did not necessarily require the jury to find that the defendant was not present during the murder of Palmer’s fiancé. Since the defendant could have believed that Palmer would identify the defendant as one of her fiancé’s killers, testimony regarding her fiancé’s murder was admissible despite the fact that the defendant previously had been acquitted of murdering Palmer’s fiancé. There is no contradiction of the prior jury’s verdict, because the second jury could still accept the defendant’s innocence of Palmer’s fiancé’s murder while still finding he had a motive to kill Palmer.

4. To Show Intent

In crimes where intent is a necessary element for conviction, extrinsic offenses may be admissible under Rule 404(b) as proof of intent. However, where the defendant is acquitted of the extrinsic offense, evidence of the prior acquittal is not always relevant to prove intent to commit the instant crime. As always, admissibility hinges on the nature of the defendant’s defense in the prior trial. Assume the defendant is indicted on two counts of murder. The defendant is accused of breaking into victim A’s house and shooting victim A while screaming, “I am going to kill you.” The defendant shot victim A three times, but one bullet missed and hit victim B, killing B instantly. Unbeknownst to the defendant, however, victim A had been killed by victim B moments before the defendant broke into the house. At the trial for victim A’s murder, the defendant is acquitted under the doctrine of impossibility. At a separate trial for the murder of victim B, testimony concerning the shooting of victim A, and the statements made by the defendant during the shooting of victim A, would be admissible to show the defendant’s intent because the prior jury did not necessarily find that the defendant lacked the requisite intent. Rather, the jury most likely determined that the defendant possessed the necessary intent, but acquitted him under the doctrine of impossibility.

In United States v. Van Cleave, the defendant was charged with stealing a truck, repainting and restamping it, and with knowingly transporting the truck across state lines. The government introduced evidence concerning a prior truck, which the defendant allegedly had

220. Id. at 123, 676 P.2d at 37.
221. McCormick on Evidence § 190, at 563 (3d ed. 1984) (“[t]o show, without considering motive, that defendant acted with malice, deliberation, or the requisite specific intent”).
222. See A. Dershowitz, The Best Defense 85-116 (1982) (details case where defendant was charged with murder, and later attempted murder, for shooting a corpse).
223. 599 F.2d 954 (10th Cir. 1979).
previously helped steal, repaint and restamp, in order to "show motive, preparation, plan, intent and knowledge, and absence of mistake." Although the defendant was acquitted of the earlier offense, the Eighth Circuit in the instant case affirmed the trial court's decision to admit the testimony concerning the prior acquittal.

The testimony should have been excluded under the Wingate rule. For the instant jury to infer the defendant's intent based on the extrinsic offense, it would have to believe that the defendant committed the prior charged crime. Since that was an issue which the prior jury found in the defendant's favor, the defendant should not be required to again prove his innocence.

In criminal cases, the government often establishes the defendant's intent by proving the crime was not committed by accident or mistake. A prior offense is relevant to disprove accident or mistake. Under this exception to Rule 404(b), 'even a prior acquittal may be relevant and not unduly prejudicial.' Prior acquittals are relevant to rebut the defense of mistake because they demonstrate that the defendant was on notice that certain behavior is illegal.

In United

224. Id. at 957.
225. See United States v. Keller, 624 F.2d 1154 (3d Cir. 1980) (evidence concerning prior charge of distribution of methamphetamines not admissible to show that defendant had the intent to distribute in the instant offense because the defendant was acquitted of the prior charge based on entrapment).
226. McCORMICK ON EVIDENCE § 190, at 561 (3d ed. 1984) ("[t]o show, by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge").

The more similar the recurring events, the more likely it is that intent was present.

Inadvertence would be an unusual and abnormal element which might perhaps be present in one instance, but the oftener similar instances occur with similar results the less likely is the abnormal element the true explanation of them. In short, since similar results do not usually occur through abnormal causes, the recurrence of similar results tends to negative accident or inadvertence or other innocent mental state, and to establish criminal intent.

State v. Hopkins, 68 Mont. 504, 511, 219 P. 1106, 1108 (1923) (citation omitted).

227. This exception to the Wingate rule has one strict requirement—the defendant must actually assert the defense of mistake or accident at the second trial. United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965). A good example of the proper use of prior acquittals under this exception to Rule 404(b) is United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973).

228. Of course, prejudice depends on how the testimony is elicited. Under this exception, extrinsic offenses need not be proved in a way which unduly prejudices the defendant. Rather than calling witnesses to testify about the defendant's prior bad acts, the defense should stipulate to the prior indictment and trial. The jury should be told that the defendant was acquitted. The judge should stress that the defendant was not guilty of the prior crime, but that because the prior charge placed the defendant on notice about the potential illegality of the activities for which charges have been brought, the jury may infer criminal intent.

229. "[P]roof that the defendant was aware of the nature of an act at an earlier point in time makes it unlikely that he would have forgotten that information at the time of the charged crime."
States v. Rocha, the defendant was convicted of possession of marijuana with intent to distribute. A search of the defendant’s van had uncovered 231 pounds of marijuana. On a previous charge of transporting marijuana, the defendant was acquitted after he claimed that he thought he was transporting furniture. At the instant trial, the government introduced evidence concerning the prior charge to counter the defendant’s mistake defense. The court properly admitted the prior acquittal as relevant to the defendant’s intent, since the prior charge put the defendant on notice not to transport strange packages without first inspecting them. The second jury could rely on the prior charge to reject the defendant’s claim of mistake in the instant case without contradicting the prior jury’s acquittal.

Evidence concerning a prior crime of which the defendant was acquitted based on the defense of accident is relevant to rebut the assertion of the defense of accident in a subsequent trial because it reduces the statistical probability of another accident occurring. Where a prior jury has not found that an accident occurred, however, that prior acquitted crime would not serve to reduce the statistical probability of another accident occurring.

Commentators have criticized the Wingate approach to the accident defense, contending that it impedes the conviction of defendants who commit multiple similar crimes and are acquitted of each case separately. This criticism is unfounded because applying the Wingate approach in this context will not necessarily require that the prior acquittal or acquittals be declared inadmissible. For example, a babysitter is charged with the murder of a child under her care. Although the government has no direct physical evidence of foul play, the defendant also has had five other children mysteriously die at vari-

230. 553 F.2d 615 (9th Cir. 1977).
231. Id.
232. Id. at 615-16.
233. See id. at 616.
234. Id.
235. Thus, the analysis for determining the relevance of a prior acquittal to rebut the defense of accident differs somewhat from the analysis for determining the relevance of a prior acquittal to rebut the defense of mistake. Whereas a prior acquittal may be relevant to rebut the defense of mistake in the second trial regardless of whether the defendant asserted the defense of mistake in the first trial, a prior acquittal offered to counter the defense of accident in a subsequent trial will only be relevant if the defendant successfully asserted the defense of accident in the prior trial.
236. See, e.g., G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.13, at 152 (2d ed. 1987).
237. The facts of this example are loosely drawn from United States v. Woods, 484 F.2d 127 (4th Cir. 1973).
ous times while under her care. Since these prior deaths occurred separately, however, the defendant was tried for one death at a time and was acquitted of each based on an accident defense. Although the government cannot pronounce the defendant guilty in the instant case on the basis of the prior accidents, there is a middle ground. Instead of questioning the jury's factual findings underlying the prior verdict, the government can agree with its result, but question the probability of the accident repeating itself in the instant case.

[T]he absence of mistake or accident is proved on a notion of probability; *i.e.*, how likely is it that the defendant would have made the same mistake or have been involved in the same fortuitous act on more than one occasion. The relevance of other crimes for this purpose depends very much on the nature of the act involved; one might inadvertently pass more than one counterfeit bill but two accidental shootings of the same victim seem quite unlikely.238

The government can introduce testimony showing that the defendant has previously asserted the defense of accident when charged with a similar crime. The second jury may then, without relitigating the prior jury’s verdict, determine the probability of the same accident occurring more than once.

V. CONCLUSION

Admitting evidence to prove an issue previously litigated and necessarily decided for the defendant in a prior prosecution is an affront to the underlying philosophy of our criminal justice system. Admission of such evidence violates the double jeopardy clause, the due process clause, and the relevancy requirement of the Federal Rules of Evidence. By admitting evidence of prior acquittals when the evidence does not contradict the prior jury’s findings, the minority view accomplishes the goal of balancing a defendant’s rights against society’s interest in convicting wrongdoers with all relevant evidence.

The Supreme Court in *United States v. Dowling*239 will soon address the admissibility of prior acquittals under Rule 404(b). Although the Court could follow the majority rule and give credence to the relative burdens of proof rationale, it should resist doing so. Instead, by extending *Ashe v. Swenson*240 down the path the Fifth Circuit paved in

Wingate v. Wainwright, the Court could help preserve the important safeguards our judicial system provides defendants. As Judge Irving Kaufman observed in United States v. Mespoulede:

Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Regardless of the Court's decision, critics will abound. If the Court must err, better that it err on the side of stronger fifth amendment protection from overzealous prosecutors and jurors incapable of heeding limiting instructions, than err by allowing highly prejudicial evidence to taint our criminal justice system.

241. 464 F.2d 209 (5th Cir. 1972).
242. 597 F.2d 329 (2d Cir. 1979).
243. Id. at 337 (citation omitted).