NOTES

EVIDENTIARY USE OF PRIOR ACQUITTED CRIMES: THE "RELATIVE BURDENS OF PROOF" RATIONALE

The fifth amendment guarantee against double jeopardy[1] protects a defendant from prosecution for an offense of which he has been previously acquitted.[2] In *Ashe v. Swenson*,[3] the Supreme Court held that criminal collateral estoppel,[4] as derived from the double jeopardy clause, precludes relitigation of an issue of "ultimate fact"[5] determined in a previous trial. In *Ashe*, the defendant was accused of robbing one of six poker players. In the first trial, Ashe was acquitted. In a second trial, Ashe was accused of robbing a different player in the same poker game. This time, Ashe was convicted.[6] The identity of Ashe as a robber was the sole issue in dispute in the first trial.[7] The acquittal in the first trial necessarily established that Ashe was not one of the robbers. The Supreme Court held therefore that the prosecution in the second trial was estopped from relitigating an ultimate fact—namely, Ashe's identity as a robber at the poker game.[8]

Ashe only bars reprosecution, which occurs when a previously deter-

1. The fifth amendment states in part: "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 fifth amendment guarantee against double jeopardy is applied to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969).

2. *See* Green v. United States, 355 U.S. 184, 188 (1957).

3. 397 U.S. 436 (1970).

4. *See infra* note 26 (distinguishing between "constitutional" and "doctrinal" criminal estoppel doctrine).

5. This Note distinguishes between ultimate and evidentiary facts. A fact is considered ultimate if it is necessary to a determination of the defendant's criminal liability. An evidentiary fact, on the other hand, merely provides support for a finding that an ultimate fact exists. *See* Note, *Collateral Estoppel Effect of Prior Acquittals*, 46 BROOKLYN L. REV. 781, 789 (1980); *see also* Comment, *Impeachment of the Criminal Defendant by Prior Acquittals—Beyond the Bounds of Reason*, 17 WAKE FOREST L. REV. 561, 582 (1981).

6. 397 U.S. at 437-40.

7. Three or four men committed the robbery at the poker game. *Id.* at 437.

8. *Id.* at 445. The Court stated that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties." *Id.* at 443. An issue has been "determined" when " 'a rational jury could [not] have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at

mined issue is an element of the subsequent charge.[9] If the "determined" issue is not an element of the subsequent charge, or if the common element was not "necessarily determined" in the first trial, *Ashe* does not preclude the admission of evidence of that element in a subsequent prosecution. If a jury renders a general verdict in the first trial, however, it may be impossible to identify those issues that were "necessarily determined." Consequently, defendants infrequently benefit from *Ashe*'s protection.[10]

The post-*Ashe* debate over the scope of constitutional collateral estoppel focuses primarily on the admissibility of evidence of a prior acquitted crime that was an ultimate fact in the initial trial, but only an evidentiary fact in the subsequent trial. The distinction between ultimate and evidentiary facts is significant. In a criminal trial, the prosecution must prove

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444 (quoting Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1, 38-39 (1960)).

Justice Brennan, concurring in *Ashe,* advocated adopting the "same transaction" test under the double jeopardy clause. Under the "same transaction" test, the prosecution must join all charges against a defendant arising from "a single act, occurrence, episode or transaction" in a single trial. *Id.* at 453-54 (Brennan, J., concurring); *see also* MODEL PENAL CODE § 1.07 (Proposed Official Draft 1962); *cf.* ILL. ANN. STAT. ch. 38, § 3-3(b) (Smith-Hurd 1972) ("same act" test).

9. *See* E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 10:06 at 11-12 (1984); Comment, *Impeachment of the Criminal Defendant by Prior Acquittals—Beyond the Bounds of Reason,* 17 WAKE FOREST L. REV. 561, 581-82 (1981); *see also* Humphries v. Wainwright, 584 F.2d 702, 705-06 (5th Cir. 1978) (because jury acquitting defendant must have decided one of two facts for defendant, subsequent trial is barred when both facts are ultimate to charged offense).

Conversely, the subsequent trial is not barred by collateral estoppel if the allegedly foreclosed issue is not an ultimate fact in the subsequent trial. *See, e.g.,* United States v. Baugus, 761 F.2d 506 (8th Cir. 1985); Douthit v. Estelle, 540 F.2d 800 (5th Cir. 1976).

10. *See* 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 17.4(a) at 382 (1984).

The problem of determining which issues were necessarily determined in a previous trial is exacerbated by the practical impossibility of ascertaining the actual basis of the prior acquittal. For example, a defendant might enter a general "not guilty" plea. The jury might then receive instructions indicating several bases for an acquittal. A general acquittal verdict will not indicate which evidence the jury considered determinative. *See* Note, *Twice in Jeopardy,* 75 YALE L.J. 262, 283 n.107 (1965); *see also* 2 W. LAFAVE & J. ISRAEL, *supra,* § 17.4(a) at 382. Some courts apparently rely on a "commonsense inference" of the jury's rationale. *See, e.g.,* Sealfon v. United States, 332 U.S. 575, 579 (1948); United States v. Hans, 548 F. Supp. 1119, 1125 (S.D. Ohio 1982).

At least one commentator suggests using special verdicts in criminal cases to simplify this determination. *See Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818, 876 (1952). However, special verdicts are generally not available in jury trials. While some jurisdictions allow special verdicts in bench trials, this option requires that the defendant sacrifice his constitutional right to a jury trial. 2 W. LAFAVE & J. ISRAEL, *supra,* § 17.4(a) at 382-83; Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 HARV. L. REV. 1, 34 (1960); *cf.* Comment, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight,"* 21 UCLA L. REV. 892, 914 (1974) (advocating exclusion of prior acquitted crimes evidence absent special jury verdict procedure).

ultimate facts beyond a reasonable doubt.[11] In contrast, most courts require proof of evidentiary facts by only clear and convincing evidence.[12] The Supreme Court's recent decision in *United States v. One Assortment of 89 Firearms*[13] suggests the appropriate limits of constitutional collateral estoppel.[14] The *89 Firearms* Court held that evidence introduced in a prior acquittal[15] is admissible in a subsequent civil trial based on the same facts. The Court reasoned that the government's burden of proof in the civil suit is lower than its burden of proof in a criminal prosecution.[16]

This Note concludes, based on the holding in *89 Firearms*, that courts should exclude prior acquitted crimes evidence on constitutional grounds only if it is necessary to prove the same ultimate fact in both the prior acquittal and the subsequent prosecution. Part I of this Note surveys the divergent views governing the admissibility of prior acquitted crimes evi-

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11. *In re* Winship, 397 U.S. 358, 364 (1970); *see also* C. MCCORMICK, MCCORMICK ON EVIDENCE § 341 at 962 (3d ed. 1984); 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2497a (Chadbourn rev. 1981). The classic definition of "proof beyond a reasonable doubt" is "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850).

12. *See, e.g.*, United States v. Etley, 574 F.2d 850, 853 (5th Cir.), *cert. denied*, 439 U.S. 967 (1978); State v. Holman, 611 S.W.2d 411, 412-13 (Tenn. 1981); *see also* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[10] at 404-57 n.6 (1982 & Supp. 1985) (citing cases mandating clear and convincing standard for proof of other crimes under Federal Rule of Evidence 404(b)). *Compare* Bray, *Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions*, 28 U. MIAMI L. REV. 489, 505 (1974) (prior acquitted crimes evidence should be excluded as undermining reasonable doubt standard) *with* C. MCCORMICK, *supra* note 11, § 190 at 564 n.47 (advocating admission of similar acquitted crimes evidence when the cumulative impact dispels reasonable doubt).

Some courts are satisfied with proof of evidentiary facts by only a preponderance of the evidence. *See, e.g.*, United States v. Leonard, 524 F.2d 1076, 1090 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); State v. Fielders, 124 N.H. 310, 314, 470 A.2d 897, 899 (1983).

One commentator predicts that courts might even be satisfied by proof sufficient to support a rational jury finding that the prior crime occurred. E. IMWINKELRIED, *supra* note 9, §§ 2:08, 10:06.

Defendants occasionally contend that evidentiary facts in criminal cases must be proven beyond a reasonable doubt. Courts uniformly reject this argument. *Id.* at § 10:13; *see also* E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN, & F. LEDERER, CRIMINAL EVIDENCE 385-87 (1979) (defining various standards of proof).

13. 104 S. Ct. 1099 (1984).

14. *89 Firearms* does not prevent individual states from providing additional protection for defendants. States cannot provide less protection than the Constitution requires, but they may provide more protection. *See generally* Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 284 & n.32 (1980).

15. This Note employs the term "prior acquittal" to refer to the defendant's trial for the prior acquitted crime.

16. 104 S. Ct. at 1104-05; *see also infra* notes 57-58 and accompanying text.

dence before *89 Firearms*. Part II discusses *89 Firearms* and its ramifications, and analyzes a post-*89 Firearms* federal district court opinion. Part III concludes that *89 Firearms* implicitly overrules the existing authority prohibiting evidentiary use of facts relating to elements of a prior acquitted crime.

I. PRE-*89 FIREARMS* SPLIT OF AUTHORITY

Under Federal Rule of Evidence 404(b) and similar state statutes, "other crimes" evidence is admissible to prove matters other than criminal propensity, such as motive, plan, intent, or knowledge.[17] When the prosecution offers evidence linking the defendant to a crime for which the defendant was previously acquitted, however, the court must apply collateral estoppel principles.[18] Criminal collateral estoppel prevents re-

17. Federal Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.

FED. R. EVID. 404(b).

Rule 404(b) only applies to evidence of separate crimes. Evidence of "other crimes" arising from the same historical transaction as the charged offense is beyond the scope of the rule. *See, e.g.*, United States v. Leichtman, 742 F.2d 598, 604 (11th Cir. 1984); United States v. Aleman, 592 F.2d 881, 884-85 (5th Cir. 1979).

18. *See* Comment, *Extension of Collateral Estoppel to Evidence from a Prior Acquitted Crime*, 35 MERCER L. REV. 1419, 1419-20 (1984). Collateral estoppel, or issue preclusion, is derived from the doctrine of res judicata, or claim preclusion. Res judicata precludes a second action between the same parties regarding the same claim. *See* 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.405(1) (2d ed. 1983); RESTATEMENT (SECOND) OF JUDGMENTS at Title D, Introductory Note (1982); C. WRIGHT, LAW OF FEDERAL COURTS § 100A at 680-82 (4th ed. 1983). Collateral estoppel provides that an issue determined by a valid and final judgment cannot be relitigated between identical parties. Estoppel applies whether the second suit is based on the same claim or a different claim. J. MOORE, *supra*, ¶ 0.441(2); RESTATEMENT, *supra*, §§ 27-29; C. WRIGHT, *supra*, § 100A at 682-84. The mutuality requirement is no longer strictly adhered to in civil litigation. However, mutuality of parties continues to be an important principle in criminal litigation. *Compare* Bernhard v. Bank of Am. Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942) (no mutuality requirement in civil litigation) *with* Standefer v. United States, 447 U.S. 10, 24 (1980) (nonmutual estoppel inappropriate). *But see* Simpson v. Florida, 403 U.S. 384, 385 (1971) (rejecting mutuality as an "ingredient" of constitutional estoppel under Ashe v. Swenson, 397 U.S. 436 (1970), *discussed supra* notes 5-11 & accompanying text); *cf.* State v. Gonzalez, 75 N.J. 181, 193-96, 380 A.2d 1128, 1135-36 (1977) (approving nonmutual estoppel in inconsistent evidence suppression rulings).

The Supreme Court recognized the applicability of res judicata in criminal cases in United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916). In *Ashe*, the Supreme Court cited *Oppenheimer* as establishing "collateral estoppel" as a rule of federal criminal law, despite the *Oppenheimer* Court's use of the term "res judicata." *Id.* at 87. Professor Wright explains that the general term "res judicata" encompasses both true res judicata (claim preclusion) and collateral estoppel (issue preclusion). C. WRIGHT, *supra*, § 100A at 680; *see also* Kaspar Wire Works, Inc. v. Leco Eng'g & Mach.,

litigation of facts[19] when a guilty verdict in the subsequent trial would be inconsistent with the defendant's acquittal in the prior trial.[20] Criminal estoppel protects defendants from the unfairness of successive prosecutions resulting from multiple statutory offenses implicated by a single criminal transaction.[21]

Prior to *89 Firearms*, courts developed four distinct approaches to criminal collateral estoppel questions. Some courts interpreted *Ashe* as prohibiting the use of evidence of an acquitted crime for any purpose. Other courts concluded that the admission of such evidence would be "fundamentally unfair." A third group interpreted the constitution to prohibit the admission of prior acquitted crimes evidence only when it is offered to prove an ultimate fact in both trials. A fourth group avoided the constitutional question altogether and admitted the evidence based on traditional evidentiary principles.

A. View #1: Under Ashe, *Ultimate Fact Determined in Prior Acquittal Not Admissible For Any Purpose*

In *Wingate v. Wainwright*,[22] the Fifth Circuit interpreted *Ashe* to preclude even evidentiary use of previously determined ultimate facts. The Fifth Circuit overturned Wingate's robbery conviction because the trial

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Inc., 575 F.2d 530, 535-36 (5th Cir. 1978). Because the doctrine of res judicata is broader than the estoppel doctrine, Irving Nat'l Bank v. Law, 10 F.2d 721, 724-25 (2d Cir. 1926), the *Ashe* Court may have construed *Oppenheimer* as applying general res judicata principles.

19. In civil litigation, the estoppel doctrine is typically framed in terms of "issues." *See, e.g.*, C. WRIGHT, *supra* note 18, § 100A; Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955). This Note, however, analyzes collateral estoppel in criminal litigation. Because the elements of a criminal charge are "questions of fact," *see* BALLENTINE'S LAW DICTIONARY at 1040 (3d ed. 1969), this Note refers to "facts" to denote the "issues" that the defendant seeks to foreclose from consideration.

20. *See* 2 W. LAFAVE & J. ISRAEL, *supra* note 10, § 17.4(a) at 380-81; *see also* United States v. Perrone, 161 F. Supp. 252, 258 (S.D.N.Y. 1958) (pre-*Ashe* case). Collateral estoppel is inapplicable if the person previously acquitted of the prior crime is different from the current defendant, even if the current defendant is allegedly the previous defendant's accomplice and the current trial involves the same transaction. *See* Commonwealth v. Brown, 473 Pa. 458, 463-65, 375 A.2d 331, 334-35 (1977).

21. *See* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970).

22. 464 F.2d 209 (5th Cir. 1972). *Wingate* represents a growing minority position in federal courts. *See, e.g.*, United States v. Keller, 624 F.2d 1154 (3d Cir. 1980); United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979).

Courts following *Wingate* may admit the evidence if the defendant fails to sustain the burden of proving that the fact was necessarily decided in the earlier trial. *See, e.g.*, United States v. Johnson, 697 F.2d 735, 740 (6th Cir. 1983).

court erroneously admitted evidence of a prior acquitted crime.[23] The court in *Wingate* refused to differentiate between evidence offered to prove an evidentiary fact and evidence offered to prove an ultimate fact.[24] The court found no basis for applying *Ashe* only when the prosecution offered evidence of facts ultimate in both trials.[25] The Fifth Circuit apparently premised its holding on the assumption that the prior acquittal established that Wingate was factually innocent of committing the prior offenses.[26]

Courts following *Wingate* misconstrue the meaning of an acquittal.[27] An acquittal conclusively establishes the defendant's "legal innocence"

23. The prosecution in *Wingate* introduced evidence of crimes arising from separate historical transactions for which the defendant had previously been acquitted. 464 F.2d at 214. Therefore, the court's holding is arguably only persuasive authority in cases in which both trials involve crimes arising from the same historical transaction. *See, e.g.,* United States v. Mock, 604 F.2d 341 (5th Cir. 1979). Arguably, *Wingate*'s rationale, extending *Ashe* to preclude evidence from prior acquittals arising from separate transactions, applies with even greater force to trials involving distinct offenses arising from the same transaction. If prior crimes evidence is barred by estoppel, then contemporaneous crimes evidence must be prohibited due to the concomitant increase in the danger that the jury will base a conviction on an improper basis. *See* Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence,* 66 IOWA L. REV. 777, 777-78 & n.3 (1981); Comment, *supra* note 18, at 1431-32 n.99. *But see* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[10] at 404-58 & n.15 (finding exclusion of prior acquitted crimes evidence illogical).

24. 464 F.2d at 213-14. Although the Fifth Circuit's estoppel analysis is flawed, *see infra* note 26 and accompanying text, the court's holding is defensible. The prosecution in *Wingate* used the prior acquitted crimes to demonstrate the defendant's criminal propensity. *Id.* at 210. The excessive emphasis on Wingate's prior acquitted crimes therefore might constitute unfair prejudice. *See* FED. R. EVID. 403; *see also* Petrucelli v. Smith, 544 F. Supp. 627, 644-45 (W.D.N.Y. 1982) (evidence of homicide of which petitioner had been acquitted deprived him of fair trial), *vacated on other grounds sub nom.* Petrucelli v. Coombe, 735 F.2d 684 (2d Cir. 1984).

25. 464 F.2d at 213.

26. *Id.* at 215. The Supreme Court explicitly rejected this assumption in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); *see infra* note 57 & accompanying text.

Several courts exclude prior acquitted crimes evidence based on an alternative estoppel analysis. For example, in United States v. Keller, 624 F.2d 1154, 1155-56 (3d Cir. 1980), the prosecution introduced evidence of a prior acquitted drug conspiracy to rebut an entrapment defense in a subsequent trial for an unrelated drug conspiracy. The Third Circuit distinguished *Ashe*'s constitutional estoppel analysis from the "doctrinal" defense of collateral estoppel, which merely precludes relitigation of evidentiary facts in a subsequent trial. *Id.* at 1158-59. A careful reading of *Keller,* however, reveals the court's heavy reliance on *Wingate*'s constitutional analysis. *See id.* at 1159-60. The court, moreover, explicitly premised its holding on the assumption that admitting the proffered evidence would be tantamount to relitigating the defendant's guilt of a crime that, according to *Wingate,* the prior acquittal established he did not commit. *Id.* at 1160.

27. *See, e.g.,* United States v. Mock, 604 F.2d 341, 345 (5th Cir. 1979) (for purposes of subsequent prosecutions, acquittal "conclusively establishe[s] that [defendant] did not participate in a marijuana conspiracy"); *cf.* Simon v. Commonwealth, 220 Va. 412, 417, 258 S.E.2d 567, 571 (1979) (not following *Wingate* would prevent defendant from "be[ing] assured" that he would be "ultimately cleared" of the prior charge).

and absolves the defendant of criminal liability. An acquittal does not prove the defendant's "factual innocence," however, because an acquittal does not purport to establish that the defendant did not in fact commit the act underlying the charge.[28]

B. View #2: Introduction of Prior Acquitted Crimes Evidence Fundamentally Unfair and Thus Automatically Inadmissible

A small minority of post-*Ashe* state courts hold that evidence of a prior acquitted crime is never admissible in a subsequent criminal trial. These courts rely on the highly prejudicial nature of prior acquitted crimes evidence and the unfairness of forcing a defendant to defend against the same charge twice.[29]

In *State v. Perkins*,[30] for example, the Florida Supreme Court held that the admission of prior acquitted crimes evidence is "fundamentally unfair" because it forces a defendant to reestablish a defense to the prior crime.[31] In *Perkins*, the defendant was convicted of attempting to rape a six-year-old girl. During the trial, the state introduced evidence that the defendant had previously committed a similar offense against a fourteen-year-old girl.[32] In the prior trial for that crime the defendant was acquitted. The Florida Supreme Court set aside the conviction on the ground that the admission of evidence of the prior acquitted crime deprived the defendant of a fair trial.[33]

The holding in *Perkins* lacks any sound constitutional foundation. The court apparently relied on the fourteenth amendment's due process clause as the basis for its "fundamental fairness" rationale.[34] The

28. *See* United States v. Price, 750 F.2d 363, 365 (5th Cir.), *cert. denied*, 105 S. Ct. 3526 (1985); State v. McCoy, 145 N.J. Super. 340, 347, 367 A.2d 1176, 1179 (1976); Perry v. Blair, 64 A.D.2d 870, 871, 407 N.Y.S.2d 371, 373 (App. Div. 1978).

29. *See, e.g.*, State v. Holman, 611 S.W.2d 411, 413 (Tenn. 1981); *cf.* State v. Little, 87 Ariz. 295, 307, 350 P.2d 756, 764 (1960) (pre-*Ashe* case).

30. 349 So. 2d 161 (Fla. 1977).

31. *Id.* at 163.

32. *Id.* at 162. The six-year-old girl testified that Perkins attempted to rape her in her bedroom late at night. The fourteen-year-old girl in the prior trial testified that Perkins entered her room late at night and "grabbed her." *Id.*

33. *Id.* at 163-64. Courts that adhere to this view contend that, under traditional evidentiary rules, the prior judgment of acquittal reduces the prior acquitted crime's probative value to the point of inadmissability. *See* State v. Holman, 611 S.W.2d 411, 412-13 (Tenn. 1981).

34. *See* 349 So.2d at 163. In Hoag v. New Jersey, 356 U.S. 464, 469-71 (1958), however, the Supreme Court held that a due process analysis was inappropriate in cases involving reprosecutions. In *Hoag*, the defendant was acquitted of robbery charges relating to three of five victims. The State of New Jersey subsequently indicted Hoag for robbing the other two victims, justifying the second

Supreme Court in *Ashe*, however, expressly noted that the fifth amendment's double jeopardy clause, not the fourteenth amendment, governs the admissibility of prior acquitted crimes evidence.[35]

C. *View #3: Under* Ashe, *Prior Acquittal Only Precludes Introduction of Evidence to Prove Ultimate Facts in Subsequent Trial*

A number of courts hold that constitutional collateral estoppel bars evidence of prior acquitted crimes only if an issue determined in the first trial is an ultimate fact in the subsequent trial.[36] The Eighth Circuit, as well as this Note, adopts this interpretation of *Ashe*. In *Flittie v. Solem*,[37] for example, the defendant, after being acquitted of murdering his stepmother, was subsequently tried as an accessory after the fact to the same crime. Reasoning that the first trial only determined that Flittie was not an accessory *before* the fact to the murder, the Eighth Circuit held that the trial court properly allowed the prosecution to introduce evidence proving that Flittie hired a man to murder his stepmother.[38] Such proof

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indictment by claiming surprise at the "unexpected failure" of state witnesses to identify Hoag as the perpetrator in the first trial. *Id.* at 469. The Supreme Court avoided ruling directly on the defendant's estoppel analysis and held instead that the state's decision to try the various counts separately was not so arbitrary or unjustified as to be fundamentally unfair under the fourteenth amendment's due process clause. *Id.* at 469-70. Because essentially identical evidence was presented in Hoag's second trial, the Court's holding arguably represents a declaration that the admission of prior acquitted crimes evidence is not fundamentally unfair and contrary to " ' the very essence of a scheme of ordered justice.' " *Id.* at 470 (quoting Brock v. North Carolina, 344 U.S. 424, 428 (1953)).

35. 397 U.S. at 442-43.

36. *See, e.g.*, Flittie v. Solem, 751 F.2d 967 (8th Cir. 1985); United States v. Pappas, 445 F.2d 1194 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971); *cf.* Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977) (successive prosecutions possibly barred when second prosecution "requires" relitigation of previously determined issues); United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972) (subsequent trial only barred when ultimate fact from first trial is included in statutory definition of subsequent charge), *cert. denied*, 410 U.S. 916 (1973). *But see* Simon v. Commonwealth, 220 Va. 412, 419, 258 S.E.2d 567, 572 (1979) (evidence of defendant's intoxication inadmissible in an involuntary manslaughter trial because of prior acquittal for driving while intoxicated, but government allowed to introduce evidence that defendant was drinking). *See* E. IMWINKELRIED, *supra* note 9, § 10:06.

37. 751 F.2d 967, 968 (8th Cir. 1985); *see also* United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). The Eighth Circuit decided *Kills Plenty* less than two months after the Fifth Circuit decided *Wingate*. The *Kills Plenty* court does not refer to *Wingate;* thus it is unclear whether the *Kills Plenty* court rejected the *Wingate* analysis.

38. 751 F.2d at 972; *accord* People v. Mendoza, 94 Ill. App. 3d 1119, 1122-23, 419 N.E.2d 390, 392-93 (1981); State v. Cannady, 670 S.W.2d 948, 952-53 (Mo. Ct. App. 1984); State v. Feela, 101 Wis. 2d 249, 263-64, 304 N.W.2d 152, 158-59 (1981), *aff'd sub nom.* Sabin v. Israel, 554 F. Supp. 390 (E.D. Wis. 1983).

was evidence of an ultimate fact in the first trial, but was only evidentiary to the crime alleged in the second trial.

In *State v. Fielders*,[39] the state introduced evidence that the defendant, on trial for first-degree assault, used a loaded gun. The defendant objected to the evidence, arguing that a previous acquittal for a related crime necessarily determined that the gun was not loaded. Conceding that the prior acquittal resulted from the failure to prove that the gun was loaded, the prosecution argued that *Ashe* does not apply to evidentiary facts offered in the subsequent trial.[40] The New Hampshire Supreme Court agreed, emphasizing the different burden of proof required for ultimate facts as opposed to evidentiary facts. In the second trial, the prosecution was not required to prove that the gun was loaded beyond a reasonable doubt. The prosecution needed to prove that the gun was loaded by only a preponderance of the evidence. The prior acquittal only established that a reasonable doubt existed that the gun was loaded. In the subsequent trial, therefore, the prosecution was free to prove the gun was loaded by a lesser standard of proof.[41]

D. View #4: An Acquittal Judgment Does Not Render Otherwise Admissible Evidence Inadmissible

Some courts analyze the prior acquitted crime issue solely on evidentiary grounds, holding that an acquittal alone is not sufficient justification for denying admissibility. Thus, Federal Rule of Evidence 404(b) permits evidence of other acquitted crimes committed by a defendant for such purposes as proof of motive, intent, plan, knowledge, or identity.[42] Under rule 404(b), the court shall admit relevant other crimes evidence unless its probative value is substantially outweighed by its potential for unfair prejudice to the defendant.[43] In practice, rule 404(b) almost al-

39. 124 N.H. 310, 470 A.2d 897 (1983).

40. *Id.* at 313, 470 A.2d at 899.

41. *Id.* at 313-14, 470 A.2d at 899-900.

42. FED. R. EVID. 404(b) (reprinted at *supra* note 17). Rule 404(b) incorporates an inclusionary approach to other crimes evidence. Under the rule, courts should exclude other crimes evidence "only on the basis of those considerations set forth in Rule 403, *i.e.* prejudice, confusion or waste of time." S. REP. NO. 1277, 93rd Cong., 2d Sess. 24, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7071.

43. FED. R. EVID. 403.

Most courts require clear and convincing proof of the prior crime before admitting other crimes evidence. *See, e.g.*, United States v. Bowman, 602 F.2d 160, 163-64 (8th Cir. 1979). *But see* United States v. DeJohn, 638 F.2d 1048, 1052 n.4 (7th Cir. 1981) (clear and convincing standard only applies to intent and motive exceptions). Other courts require proof by only a preponderance of the

ways leads to the admission of other crimes evidence.[44]

In *United States v. Van Cleave*,[45] the defendant stood trial for stealing a truck. As proof of motive and intent, the government offered a co-conspirator's testimony that the defendant had previously repainted and restamped a stolen truck.[46] The trial court admitted the evidence despite the fact that the defendant was previously acquitted of charges based on the conduct described in the co-conspirator's testimony. The United States Court of Appeals for the Tenth Circuit affirmed the defendant's conviction, finding that the lower court properly admitted the evidence of the prior crime to show motive and intent.[47] Other courts have simi-

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evidence. *See, e.g.*, United States v. Kahan, 572 F.2d 932, 937 (2d Cir.), *cert. denied*, 439 U.S. 833 (1978); United States v. Leonard, 524 F.2d 1076, 1090-91 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). A third group of courts applies the standard established by Federal Rule of Evidence 104(b). Rule 104(b) states that "the court shall admit [evidence relevant only if a fact condition is met] upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." FED. R. EVID. 104(b). *See, e.g.*, United States v. Mortazavi, 702 F.2d 526, 528 (5th Cir. 1983); *cf.* United States v. Cyphers, 553 F.2d 1064, 1070 (7th Cir.) ("clear and convincing" standard looks only to "whether a sufficient factual basis exists for" other crimes evidence), *cert. denied*, 434 U.S. 843 (1977).

Under all of the above standards, the court decides the preliminary admissibility question, balancing the evidence's probative value against its potential prejudice to the defendant. If the evidence is admitted, the defendant may demand that the court give the jury a limiting instruction, limiting the evidence to a permissible purpose. FED. R. EVID. 104(a) and advisory committee note; FED. R. EVID. 105.

44. *But see* People v. Corbeil, 77 Mich. App. 691, 259 N.W.2d 193 (1977).

45. 599 F.2d 954 (10th Cir. 1979).

46. *Id.* at 956-57. The testimony indicated that the accomplice stole a 1971 White Freightliner truck in exchange for Van Cleave's agreement to repaint and restamp a stolen White Western Star truck. *Id.* at 956. Van Cleave was acquitted in an earlier trial on charges relating to the Western Star vehicle. The second trial involved the theft of the White Freightliner. *Id.* at 955.

47. *Id.* at 957. The *Van Cleave* court held that "[e]vidence of another crime, otherwise competent, is not necessarily rendered inadmissible by the fact that the accused was acquitted of such charge. . . . [The] [e]vidence [of the prior acquitted crime] was not introduced for the purpose of retrying Van Cleave on the charge for which he had been acquitted." *Id.* Any prejudice to Van Cleave that might have resulted from admitting the evidence was easily offset by the highly probative nature of the evidence. *Id. Accord* State v. Sefton, 125 N.H. 533, 485 A.2d 284 (1984) (evidence of defendant's drinking and "influence of liquor upon him" admisssible to prove motive in trial for leaving accident scene when defendant previously acquitted of driving while intoxicated).

Among courts adopting *Van Cleave*'s holding, considerable disagreement exists regarding whether defendants have the right to inform the jury of the prior acquittal judgment. *See* E. IMWINKELREID, *supra* note 9, § 10:07; Comment, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight,"* 21 UCLA L. REV. 892, 906-07 (1979). *Compare* United States v. Kerley, 643 F.2d 299 (5th Cir. 1981) (court's decision to admit the prior crimes evidence implicitly includes the decision not to inform the jury of the acquittal judgment) *and* United States v. Viserto, 596 F.2d 531 (7th Cir.) (same), *cert. denied*, 444 U.S. 841 (1979) *with Ex parte* Bayne, 375 So. 2d 1239 (Ala. 1979) (prior acquittal judgment admissible).

The defendant may of course request limiting instructions to militate against improper use of the

larly admitted evidence of prior acquitted crimes for diverse purposes, including proof of knowledge,[48] identity,[49] a common plan or scheme,[50] *res gestae*,[51] an overt act in furtherance of conspiracy,[52] and the absence of accident.[53]

II. THE EMERGENCE OF THE "RELATIVE BURDENS OF PROOF" RATIONALE

In *United States v. One Assortment of 89 Firearms*,[54] the government instituted civil forfeiture proceedings against the defendant Mulcahey, claiming Mulcahey possessed firearms for use in an unlicensed firearms business. Mulcahey claimed that his prior acquittal on related criminal charges estopped the government from bringing the forfeiture action.[55] In *89 Firearms*, the Supreme Court overruled a century-old precedent that barred civil forfeiture proceedings on estoppel grounds when the defendant had been previously acquitted of criminal charges based on the same facts.[56] The Court emphasized that an acquittal does not establish

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evidence. C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5249 at 538-40 (1978 & Supp. 1985). *But see* Bray, *Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions*, 25 U. MIAMI L. REV. 489, 496-97 & n.27 (1974) (right to limiting instructions not uniformly recognized).

48. *See, e.g.*, United States v. Castro-Castro, 464 F.2d 336, 337 (9th Cir. 1972), *cert. denied*, 410 U.S. 96 (1973); State v. Paradis, 106 Idaho 117, 123, 676 P.2d 31, 37 (1983), *cert. denied*, 104 S. Ct. 3592 (1984).

49. *See, e.g.*, People v. Beamon, 8 Cal. 3d 625, 633, 504 P.2d 905, 910, 105 Cal. Rptr. 681, 686 (1973); Jenkins v. State, 147 Ga. App. 21, 21-22, 248 S.E.2d 33, 34 (1978); State v. Smith, 271 Or. 294, 296, 532 P.2d 9, 10 (1975).

50. *See, e.g.*, Oliphant v. Koehler, 594 F.2d 547, 555 (6th Cir.), *cert. denied*, 444 U.S. 877 (1979); State v. Yormark, 117 N.J. Super. 315, 337, 284 A.2d 549, 560 (1971), *vacated in part on other grounds sub nom.* State v. Mulvaney, 61 N.J. 202, 293 A.2d 668 (1972).

51. *See, e.g.*, State v. Millard, 242 S.W. 923, 926 (Mo. 1922) (pre-*Ashe*).

52. *See, e.g.*, United States v. Garza, 754 F.2d 1202, 1209-10 (5th Cir. 1985); United States v. Etley, 574 F.2d 850, 853 (5th Cir.), *cert. denied*, 439 U.S. 967 (1978).

53. *See, e.g.*, People v. Griffin, 66 Cal. 2d 459, 464-65, 426 P.2d 507, 510-11, 58 Cal. Rptr. 107, 111 (1967) (pre-*Ashe*).

54. 104 S. Ct. 1099, 1102 & n.2.

55. *Id.* at 1101-02 & n.1. Mulcahey admitted his involvement in the transactions in question. He pleaded an entrapment defense to the criminal charges. *Id.*

56. *Id.* at 1104. The Supreme Court in *89 Firearms* overruled Coffey v. United States, 116 U.S. 436 (1886). The defendant in *Coffey* was tried and acquitted on charges of concealing distilled spirits with intent to commit tax fraud. 116 U.S. at 442. The government subsequently brought an action in rem against the distillery and seized distilled spirits. The Supreme Court held that the issues in the forfeiture proceeding had already been resolved against the government in the criminal trial. *Id.* at 444-45.

The *89 Firearms* Court disapproved of the *Coffey* Court's suggestion "that [either] collateral es-

a defendant's factual innocence. Instead, an acquittal merely proves that the jury entertained a reasonable doubt of the defendant's guilt.[57] Because the government must establish forfeiture claims by only a preponderance of the evidence, the Court concluded that "the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel."[58]

The Supreme Court's holding in *89 Firearms* establishes the government's right to bring a civil forfeiture action against a defendant who has been acquitted of related criminal charges. The principles enunciated by the Court, however, should also apply to consecutive criminal trials if the burden of proof of a particular fact is lower in the subsequent trial than in the first trial. In particular, the burden of proof for ultimate facts in a criminal trial is higher than the burden of proof for evidentiary facts. Accordingly, this Note advocates an interpretation of *89 Firearms* and *Ashe* that permits the government to introduce facts for evidentiary purposes even though the facts were ultimate facts in a prior aquittal.

In *United States v. Crispino*,[59] the United States District Court for the District of New Jersey refused to extend *89 Firearms*' "relative burdens

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toppel [or] double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges." 104 S. Ct. at 1104 (citing *Coffey*, 116 U.S. at 444-45).

57. 104 S. Ct. at 1104. The *89 Firearms* Court went so far as to say that "[w]e need not be concerned" with the reasons for the jury's acquittal verdict. *Id.* The Supreme Court therefore rejected the *Wingate* court's assumption that an acquittal establishes the defendant's factual innocence. *Id.* (acquittal "merely proves the existence of a reasonable doubt as to [the defendant's] guilt).

58. *Id.* at 1104-05 (citations omitted). *But cf.* Commonwealth v. Brown, 503 Pa. 514, 521-25, 469 A.2d 1371, 1374-76 (1983) (state barred from bringing probation revocation hearing following related acquittal when state postponed revocation hearing until after criminal trial).

The Court also rejected the defendant's contention that because the forfeiture proceeding culminated in a punitive sanction it was criminal in nature, thus subjecting him to double jeopardy for the same offense. 104 S. Ct. at 1107. The Court examined the forfeiture statute's legislative history and concluded that Congress intended the forfeiture sanction to be remedial rather than punitive. *Id.* at 1105-07.

The *89 Firearms*' "punitive-remedial" analysis is only relevant when a defendant in a civil action disputes whether the proceeding is civil in nature. The *89 Firearms* Court reached this issue only in response to the defendant's argument that the punitive nature of a forfeiture proceeding rendered the action quasi-criminal. When a defendant's subsequent trial is by definition criminal, the punitive-remedial dichotomy is inapposite. Thus, courts applying *89 Firearms* in the criminal context should focus solely on that portion of the opinion that discusses the relative burdens of proof and the significance of a jury acquittal. *See id.* at 1107. *See also* People v. Grayson, 58 Ill.2d 260, 264-65, 319 N.E.2d 43, 45-46 (1974), *cert. denied*, 421 U.S. 994 (1975) (probation revocation proceeding is "criminal in nature"); *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-1984*, 73 GEO. L.J. 249, 542 n.1666 (1984) (double jeopardy protection encompasses proceedings not formally but effectiveley criminal prosecutions).

59. 586 F. Supp. 1525, 1535 (D.N.J. 1984).

of proof" rationale to subsequent criminal trials, denying admission of a prior acquitted crime as an evidentiary fact in a subsequent criminal trial. The *Crispino* court erred in its interpretation of *89 Firearms*, however, and created analytical problems typical of the pre-*89 Firearms* criminal estoppel analysis.[60]

In *Crispino*, a jury acquitted the defendant of conspiracy and violation of federal laws prohibiting the importation and distribution of illegal narcotics. In a subsequent trial, the government charged Crispino with tax evasion, a criminal offense, for failing to report income earned from the drug trafficking. The same transactions were implicated in both trials.[61] The trial court refused to admit evidence in the tax trial that was admitted in the prior unsuccessful narcotics trial.[62]

In the tax case, the government sought to establish that the "likely source" of Crispino's alleged unreported income was Crispino's drug business.[63] Insisting that it was not attempting to relitigate Crispino's status as a drug dealer, the government asserted that the likely income source was only an evidentiary fact in the subsequent trial. The government argued, therefore, that evidence of Crispino's drug-related activities was admissible under *89 Firearms*' "relative burdens of proof" rationale.[64] The *Crispino* court, however, limited the application of *89 Fire-*

60. *Cf.* C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5239 at 427 & n.3 (1978) (commenting on poorly reasoned opinions in cases involving other crimes evidence).

61. 586 F. Supp. at 1526-27.

62. *Id.* at 1534. The United States prepared an appeal in *Crispino;* however, Crispino subsequently pleaded guilty to the tax evasion charges. Telephone interview with Faith S. Hochberg, Assistant United States Attorney, Newark, New Jersey (Jan. 14, 1985).

63. Brief in Support of Motion to Admit Evidence of Defendant's Likely Source of Income at 6-7, United States v. Crispino, 586 F. Supp. 1525 (D.N.J. 1984) [hereinafter cited as *Brief in Support*]. Crispino admitted that he guided the drug-laden trawlers into port and that he failed to report as income money received from that work. Crispino only disputed that he knew the boats contained narcotics. *Id.* at 7.

64. *See Brief in Support, supra* note 63, at 8-9. To establish the elements of willful tax evasion, *see* 26 U.S.C. § 7201 (1982), the government must prove "willfulness; the existence of a tax deficiency . . .; and an affirmative act constituting an evasion or attempted evasion of the tax" beyond a reasonable doubt. *See* Sansone v. United States, 380 U.S. 343, 351 (1965).

The government proposed to prove Crispino's undeclared tax liability by the "net worth plus expenditures" method of proof. *See Brief in Support, supra* note 63, at 3 (citing Holland v. United States, 348 U.S. 121, 125 (1954) (listing elements of net worth proof)). The net worth proof developed to permit a jury to infer willful tax evasion based upon "proof of a likely source [of unreported taxable income], from which the jury could reasonably find that the net worth increases sprang . . . ." *Holland,* 348 U.S. at 138. The prosecution need only "suggest" the likely source. *Brief in Support, supra* note 63, at 7 (quoting Estate of Mazzoni v. Commissioner, 451 F.2d 197, 200 (3d Cir. 1971)).

Crispino argued that the evidence of the "likely" income source must be proven beyond a reasonable doubt. *See* Letter in Reply to the Defendant's Brief in Opposition to the Government's Motion

arms solely to situations in which a civil proceeding follows an acquittal on related criminal charges, and therefore rejected the government's argument.[65]

Although the *Crispino* court acknowledged that the defendant's alleged drug trafficking was not an ultimate fact in the tax evasion trial,[66] it considered the burden of proof differential irrelevant.[67] In so holding, the court resurrected the *Wingate* court's assumption, discredited in *89 Firearms*, that an acquittal proves the defendant's factual innocence.[68]

III. A PROPOSED APPROACH TO THE ADMISSIBILITY OF PRIOR ACQUITTED CRIMES EVIDENCE IN CRIMINAL CASES

After *89 Firearms*, the determination of which ultimate facts from the prior acquittal are ultimate facts in the subsequent trial is essential in determining the admissibility of prior acquitted crimes evidence. If a particular fact is an ultimate fact in both trials, the Supreme Court's holding in *Ashe* may preclude the admission of evidence of that fact in the subsequent trial.[69] On the other hand, if an ultimate fact in the first trial is merely an evidentiary fact in the subsequent trial, *89 Firearms* precludes exclusion of the evidence on constitutional grounds.[70]

Determining whether a particular fact is an ultimate fact or an evidentiary fact, however, is often a difficult task. Although statutes establish those facts comprising the elements of most crimes, the common law often supplements the statutory definition,[71] thus complicating the pro-

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to Admit at 2, United States v. Crispino, 586 F. Supp. 1525 (D.N.J. 1984). Crispino's argument ignores the fundamental distinction between ultimate facts and evidentiary facts. Only ultimate facts, or elements of the charge, must be proven beyond a reasonable doubt. Evidentiary facts, from which the jury infers the existence of ultimate facts, must be proven by no more than clear and convincing evidence. *See* Simon v. Commonwealth, 220 Va. 412, 258 S.E.2d 567 (1979).

65. 586 F. Supp. at 1533.

66. *Id.* at 1529 & n.2.

67. *Id.* at 1531.

68. *Id.* at 1533-34; *see supra* note 57. Additionally, the court misinterpreted the *89 Firearms*' punitive-remedial analysis. As discussed *supra* note 58, the punitive-remedial distinction is inapposite in an indisputably criminal trial.

69. *See supra* notes 3-9 and accompanying text (discussing *Ashe*); *accord* Turner v. Arkansas, 407 U.S. 366, 368-70 (1972) (per curiam); Harris v. Washington, 404 U.S. 55, 56-57 (1971) (per curiam); Sealfon v. United States, 332 U.S. 575, 578-80 (1948); State v. Clements, 383 So. 2d 818, 820-21 (Miss. 1980).

70. *See supra* notes 54-58 and accompanying text.

71. For example, the statutory definition of tax evasion, the charge in *Crispino*, does not include proof of a likely income source. *See* 26 U.S.C. § 7201 (1982). The Supreme Court added that requirement in Holland v. United States, 348 U.S. 121, 137-38 (1954).

cess of distinguishing ultimate facts from evidentiary facts. In *United States v. Kills Plenty*,[72] the United States Court of Appeals for the Eighth Circuit implied that only those facts required to establish the statutory definition of the charged offense constitute true "ultimate facts." According to the court, all other facts are evidentiary facts subject to a lower standard of proof. When the common law definition of a crime conflicts with a statutory definition, the latter controls.[73]

The facts of the *Crispino* case discussed above provide a useful paradigm for the application of this Note's proposed analysis of prior acquitted crimes evidence. Recall that in *Crispino* the defendant's second trial was for tax evasion. The statutory definition of tax evasion is the willful attempt "to evade or defeat any tax . . . or the payment thereof."[74] The government sought to introduce evidence of Crispino's drug trafficking activity to show a likely income source. Under the proposed analysis, because proof of a likely income source is not a statutory element of the charged offense, the evidence represents an evidentiary fact. Thus, Crispino's prior acquittal judgment on the drug trafficking offense will not estop the government from introducing the evidence in the subsequent prosecution for tax evasion.

Even if the evidence is constitutionally admissible, the evidence is not legally relevant until the prosecution demonstrates that the defendant committed the prior act.[75] The court should instruct the jury to disregard prior acquitted crimes evidence unless the jury finds the prosecution has met the burden of proof for evidentiary facts.[76]

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72. 466 F.2d 240, 243 (8th Cir. 1972) (stating that intoxication is not an ultimate fact in manslaughter determination), *cert. denied*, 410 U.S. 916 (1973).

73. *See* United States v. Braverman, 373 U.S. 405, 408 (1963). *But cf.* State v. Prieur, 277 So. 2d 126, 130 (La. 1973) (promulgating rule supplementing "similar crimes" statutes under court's supervisory power).

74. 26 U.S.C. § 7201 (1982); *see supra* note 44 (discussing elements of tax evasion).

75. *See* FED. R. EVID. 104(b) advisory committee note; E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 39-40 (J. Weinstein 5th ed. 1976).

76. Texas enacted a similar statute prohibiting the admission of improperly seized evidence. The statute states in pertinent part:

> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CRIM. PRAC. CODE ANN. § 38.23 (Vernon 1979). Failure to so instruct the jury upon timely request is reversible error. *See* Morr v. State, 631 S.W.2d 517, 518 (Tex. Crim. App. 1982).

Courts should give a similar instruction regarding prior acquitted crimes and the requisite burden of proof. *Cf.* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT § 3.07 (1985) (Elements of Offense; Burden of Proof); *id.* at § 3.11 (definition of reasonable doubt).

IV. CONCLUSION

The methodology proposed in this Note minimizes the potential for confusion in analyzing evidence of prior acquitted crimes. This methodology provides courts with a simple, straight-forward means to apply modern double jeopardy theory in consecutive criminal trials.

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