Notes

DOUBLE JEOPARDY AND ITS APPLICATION TO BROKEN PLEA AGREEMENTS

Eric S. Baker

The double jeopardy clause of the fifth amendment states that no individual shall be put in jeopardy twice for the same crime.[1] The concept of double jeopardy dates back at least 2,000 years.[2] Despite its long history, the application of the double jeopardy clause constantly changes.[3] In fact, courts often find occasion to develop exceptions to this doctrine.[4]

One of the most recent exceptions involves plea agreements and their relationship with the double jeopardy clause.[5] The plea bargaining system has emerged in recent years as a very useful tool for prosecutors and defendants. Plea agreements allow early disposition of cases without resorting to costly trials which can place great burdens on the courts.[6]

This Note examines the principles behind the double jeopardy clause and plea agreements. Additionally, it explores the effect of a broken plea agreement on a defendant's right to be free from double jeopardy and the implications of that effect.

PRINCIPLES OF DOUBLE JEOPARDY

The double jeopardy clause is not unique to the United States Constitution. Similar provisions are documented as far back as the early develop-

1. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . ." U.S. CONST. amend. V.

2. Comment, *Resentencing Defendants and the Protection Against Multiple Punishment*, 133 U. PA. L. REV. 1409, 1411 (1985). This Comment cited *United States v. Scott* which stated that the double jeopardy provision in the American Constitution "had its origins in the three common-law pleas of *autrefois acquit, autrefois convict*, and pardon. These three pleas prevented the retrial of a person who had previously been acquitted, or pardoned for the same offense." 437 U.S. 82, 87 (1978). In *Ex parte Lange*, it was pointed out that the provisions articulated in the fifth amendment come from these same ancient common law principles emanating from the Magna Carta. 85 U.S. (18 Wall.) 163, 168-71 (1873).

3. *See infra* note 92 and accompanying text.

4. *See infra* notes 22-31 and accompanying text.

5. *See* Ricketts v. Adamson, 107 S. Ct. 2680 (1987).

6. *See infra* note 36.

ment of the English common law[7] where the protection against double jeopardy applied only to cases reaching final judgment.[8] The United States Supreme Court expanded the protection to include mistrials, ruling that the provision should attach at the beginning of prosecution and not only at final judgment.[9] The courts, however, are split as to what point in the prosecution the double jeopardy provision attaches.[10] Moreover, there are certain instances when the expanded protection of double jeopardy will not preclude retrial.[11]

The reasons for a double jeopardy provision include: protecting an individual from facing the risks of conviction twice;[12] preventing the physical, psychological, and financial burdens associated with successive trials;[13] and prohibiting the prosecution from having another opportunity to supply evidence it failed to collect in the first proceeding.[14] The main thrust behind the double jeopardy doctrine is to prevent the state, which possesses enormous resources and power, from making repeated attempts to convict an individual for the same crime. This would violate basic notions of fairness and even risk the possibility that an innocent person be found guilty of a crime he did not commit.[15]

Throughout American history, the application of and protection guaranteed by the double jeopardy clause has expanded in many ways. For example, in *Benton v. Maryland*[16] the Supreme Court applied the double jeopardy clause to the states through the fourteenth amendment.[17] Other cases reflect the Court's willingness to recognize double jeopardy and prevent a new trial. This occurs when there is either a conviction for an offense and the prosecution seeks to pursue a lesser included offense;[18] or a trial

7. M. FRIEDLAND, DOUBLE JEOPARDY 5-15 (1969). *See also* 4 W. BLACKSTONE, COMMENTARIES 335 (1972). ("[It is a] universal maxim of the common law of England that no man is to be brought into jeopardy of his life, more than once, for the same offense.").

8. *Ex parte* Lange, 85 U.S. (18 Wall.) at 168.

9. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (absent "manifest necessity" or to preserve the "ends of public justice," no retrial should be allowed, and the decision is left to the discretion of the court).

10. *See, e.g.*, Crist v. Bretz, 437 U.S. 28, 38 (1978) (federal rule that double jeopardy attaches when the jury is sworn is an integral part of the fifth amendment and is applicable to the states through the fourteenth amendment); Downum v. United States, 372 U.S. 734, 737 (1963) (double jeopardy attaches when the jury is sworn but discharged before trial); United States v. Milhim, 702 F.2d 522, 523 (5th Cir. 1983) (further prosecution does not violate double jeopardy ban when jury is dismissed after being empaneled but before being sworn).

11. *See infra* notes 22-31 and accompanying text. *See also* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED 298 (1986).

12. Green v. United States, 355 U.S. 184, 187-88 (1957) (retrial barred if defendant acquitted the first time).

13. Howard v. United States, 372 F.2d 294, 299 (9th Cir.), *cert. denied*, 388 U.S. 915 (1967).

14. Tibbs v. Florida, 457 U.S. 31, 41-42 (1982).

15. *See Green*, where Justice Black stated that one of the major goals of double jeopardy is to avoid the possibility that an innocent defendant be found guilty. 355 U.S. at 187-88. Additionally, the court in *Carsey v. United States* observed that changes initially favorable to the defendant could affect the outcome of a second trial. 392 F.2d 810, 812 (9th Cir. 1967).

16. 395 U.S. 784 (1969). *Benton* expressly overruled Palko v. Connecticut, 302 U.S. 319 (1937), which held that double jeopardy principles did not apply to states.

17. The Court in *Benton* stated that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . it should apply to the States through the Fourteenth Amendment." 395 U.S. at 794.

18. Payne v. Virginia, 468 U.S. 1062, 1062-63 (1984) (double jeopardy clause bars state court

judge grants a motion for new trial because the evidence is insufficient at the original trial;[19] or when conviction for one offense requires exactly the same facts for conviction as another;[20] or finally when two courts within a state attempt to prosecute an individual for the same crime.[21]

Although courts have expanded double jeopardy protection, they also recognize many exceptions to its application. For example, in *United States v. Scott*[22] the Supreme Court held that when a defendant successfully terminates his trial through motion or other strategies without determination as to guilt or innocence, an appeal by the government does not violate double jeopardy.[23]

Similarly, the Court in *Tibbs v. Florida*[24] held that an appellate reversal based on the weight of the evidence, as distinguished from a reversal based on the sufficiency of the evidence, does not bar retrial.[25] Therefore, when a prosecutor presents a solid case containing sufficient evidence that leads to conviction but is eventually overturned on appellate review, the double jeopardy clause will not bar retrial as it does when a court dismisses a case for insufficient evidence.[26]

Moreover, double jeopardy does not apply in the case of mistrial due to a hung jury,[27] when the defendant seeks a mistrial and the request is not due to overreaching by the judge or prosecution,[28] or when a defendant's conviction is overturned on appeal.[29] In addition, lower courts sometimes endorse

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prosecution and conviction for the lesser included offense of robbery following a prior conviction for murder committed during the robbery).

19. Hudson v. Louisiana, 450 U.S. 40, 44-45 (1981) (relying on Burks v. United States, 437 U.S. 1, 18 (1978), which held that "the double jeopardy clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support a guilty verdict). *See also* Greene v. Massey, 437 U.S. 19, 24 (1978), *cert. denied*, 404 U.S. 1046 (1984) (no second trial allowed after reviewing court determines that the evidence is insufficient).

20. Whalen v. United States, 445 U.S. 684, 693-94 (1980) (The Court held that the defendant could not be convicted for both murder and rape because "a conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape.").

21. Waller v. Florida, 397 U.S. 387, 394-95 (1970) (In overturning a conviction in a municipal court based on double jeopardy, the Court held that "the state of Florida and its municipalities are not separate sovereign entities entitled to impose punishment for the same alleged crime, as the judicial power of the municipal and state courts of general jurisdiction springs from the same organic law.").

22. 437 U.S. 82 (1978).

23. *Id.* at 101.

24. 457 U.S. 31 (1982).

25. The Court construed the double jeopardy clause as requiring defendants to be retried after their convictions have been reversed on evidentiary weight. *Id.* at 47.

26. *Id.*

27. Richardson v. United States, 468 U.S. 317, 326 (1984) (retrial is permitted even if there is insufficient evidence at the first trial if the jury cannot reach a verdict). This is the concept of "continuing jeopardy," meaning no conclusion has been made as to guilt or innocence. *Id.* at 327.

28. Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982) (When a defendant in a criminal trial makes a successful move for a mistrial, he may invoke the double jeopardy bar only if the conduct giving rise to the mistrial motion is based on prosecutorial or judicial misconduct intended to provoke the defendant into moving for a mistrial.).

29. Justices of Boston Mun. Court v. Lyndon, 466 U.S. 294, 308 (1984) (The double jeopardy clause "does not bar reprosecution of a defendant whose conviction is overturned on appeal."). To support this position, the Court cited United States v. Tateo, 377 U.S. 463, 466 (1964):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment

the view that the defendant must move for dismissal on double jeopardy grounds prior to trial or the claim is waived.[30] The Supreme Court recently endorsed an exception preventing the application of double jeopardy in cases involving a defendant's broken plea agreement.[31]

PRINCIPLES OF PLEA AGREEMENTS

Over the years, the plea agreement emerged as an important tool for both prosecutors and defense attorneys.[32] *Santobello v. New York*[33] exemplifies the importance of these agreements. *Santobello* involved a prison sentence overturned because the prosecutor did not honor the plea agreement.[34] After negotiations with the prosecutor, the defendant withdrew his not guilty plea to two felony counts and pled guilty to a lesser offense. The prosecutor agreed not to make a sentencing recommendation. Months later, a new prosecutor appeared at the sentencing hearing and asked for the maximum sentence. The judge imposed this sentence, stating that he was influenced by the recommendation. The petitioner then attempted to withdraw his guilty plea. The Supreme Court held that the failure of the prosecution to keep a promise either requires specific performance or permission to withdraw.[35]

In *Santobello*, the Court identified the importance of plea agreements and emphasized their desirability.[36] The Court reasoned that if every criminal charge were sent to trial, the number of judges and court facilities would have to be drastically increased.[37]

Since the advent of plea agreements, the vast majority of criminal convictions have resulted from guilty pleas, sparing valuable time and easing the schedule of the courts.[38] Courts have upheld the validity of plea agreements except when they are the product of threats, misrepresentation or improper

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because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

Lyndon, 466 U.S. at 308.

30. *See, e.g.*, United States v. Bascaro, 742 F.2d 1335, 1365 (11th Cir. 1984). *See also* FED. R. CRIM. P. 12(f) providing that the failure to assert double jeopardy prior to trial constitutes waiver.

31. *Adamson*, 107 S. Ct. at 2681. For a discussion of *Adamson*, see *infra* notes 76-91 and accompanying text.

32. Eighty to ninety percent of all convictions result from guilty pleas. J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.2 (2nd ed. 1983). *See* Note, *Double Jeopardy, Due Process, and the Breach of Plea Agreements*, 87 COLUM. L. REV. 142 n.1 (1987) ("[I]n federal courts, 81% of the criminal convictions obtained in fiscal year 1982 were based on guilty pleas."). *See also* Cleary, *Plea Negotiation and Its Effects on Sentencing*, 37 FED. B.J. 61, 62 (1978) (Approximately 85% of all federal cases are disposed by guilty plea.).

33. 404 U.S. 257 (1971).

34. *Id.* at 262.

35. *Id.* at 258.

36. The Court stated that a plea agreement is desirable because it leads to

> prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id. at 260. *See also* Brady v. United States, 397 U.S. 742, 751-52 (1970).

37. *Santobello*, 404 U.S. at 260.

38. *See supra* note 31 and accompanying text.

bargaining.[39] Furthermore, a defendant's guilty plea can be challenged under the due process clause of the fourteenth amendment[40] only when the individual was not thoroughly informed of the consequences of such a plea.[41]

Courts have been careful to ensure that a decision to plead guilty is made in a voluntary fashion.[42] In *Boykin v. Alabama*,[43] the Supreme Court held that the defendant's conviction was subject to reversible error because there was no indication in the record that his decision to plead guilty was made voluntarily.[44] The Court in *Johnson v. Zerbst*[45] set the standard for voluntariness and held that the waiver of a constitutional right is not valid under the due process clause unless it is the result of a conscious decision.[46]

A guilty plea results in the waiver of many important constitutional rights.[47] Some courts have held, however, that the defense of double jeopardy is not waived by such a plea. For example, in *Menna v. New York*,[48] the Court indicated that there are some circumstances when a double jeopardy defense cannot be waived, but the Court did not affirmatively state it could be waived.[49] As a result, the lower courts have come to different conclusions on the waiver of the defense of double jeopardy.[50]

Courts have compared plea agreements with contracts: the government agrees not to prosecute and the defendant agrees to fulfill the obligations dictated by the agreement.[51] Because of plea agreements' contractual na-

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39. *See, e.g., Brady*, 397 U.S. at 755.

40. Mabry v. Johnson, 467 U.S. 504, 510 (1983). The Court recognized in this case that plea arrangements are bargained for and are no less voluntary than any other agreement. *Id.*

41. *Id.*

42. FED. R. CRIM. P. 11 provides guidelines for the trial judge to follow before a plea is accepted. One commentator interprets the guidelines as requiring the judge to make sure the defendant understands the nature of the charges, the mandatory and minimum sentences possible, any constitutional waivers resulting from a guilty plea, and that anything he says is on record and could later be used adversely. The judge must ask these questions in open court to ensure they are not the product of "force, threats or promises apart from the plea agreement." Note, *Project: Criminal Procedure—Guilty Pleas*, 75 GEO. L.J. 965, 970 (1987).

43. 395 U.S. 238 (1969).

44. *Id.* at 238.

45. 304 U.S. 458, 467-68 (1938) (A defendant can waive the right to counsel if done intelligently based on the circumstances and facts.).

46. The Court in *Zerbst* stated that there must be "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

47. Boykin v. Alabama, 395 U.S. 238, 243 (1969) (A plea of guilty waives the right to a jury trial, the privilege against self-incrimination, and the right to confront accusers.); United States v. Andrews, 790 F.2d 803, 810 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1898 (1987) (guilty plea waives ability to pursue speedy trial claim); United States v. Johnson, 634 F.2d 385, 386 (8th Cir. 1980) (defendant precluded from challenging allegedly illegally obtained evidence because he pled guilty). *See also* Note, *supra* note 42.

48. 423 U.S. 61 (1975). *See also* United States v. Broussard, 645 F.2d 504, 505 (5th Cir. 1981) (plea of guilty does not waive double jeopardy).

49. *Menna*, 423 U.S. at 62-63 n.2. When an indictment violates double jeopardy on its face, a guilty plea cannot waive the doctrine. *Id.*

50. *See* Note, *supra* note 42, at 1027-28. The analysis includes United States v. Broce, 781 F.2d 792, 795 (10th Cir. 1986), in which the court held that double jeopardy may never be waived. Another court, in Launius v. United States, 575 F.2d 770, 772 (9th Cir. 1978), required only that waiver be "informed and intentional."

51. United States v. Verrusio, 803 F.2d 885, 887 (7th Cir. 1986) ("a plea agreement is a contract"); Jones v. Estelle, 584 F.2d 687, 689 (5th Cir. 1978) (a plea agreement is contractual in nature).

ture, courts have held that a party who breaks the agreement is in breach and the non-violating party is justified in refusing to perform.[52] If the government fails to fulfill its obligations, a defendant may withdraw from the agreement.[53] Similarly, if a defendant does not abide by the terms of a plea agreement the government may withdraw as well.[54] The Supreme Court took this a step further when it recently held that a defendant who breaks a plea agreement may be prosecuted for the original charge without violating double jeopardy.[55]

BROKEN PLEA AGREEMENTS: AN EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE

In order to achieve the goals of plea agreements, adherence to the terms of those agreements is essential. Understandably, courts are careful to ensure that both the government and defendants follow guidelines set in such agreements. As was evident in *Santobello*, when the state fails to abide by the terms of the agreement harsh consequences may result.[56] The defendant may also suffer as a result of a failure to fulfill plea agreement obligations.[57]

The Florida Example

In *Brown v. State*,[58] the Florida Supreme Court held that failure to abide by a plea agreement allows the state to prosecute the defendant without violating double jeopardy.[59] In *Brown*, the defendant entered into a plea agreement whereby he agreed to provide testimony in the prosecution of another suspect who was charged with murder.[60] When Brown refused to testify, he was prosecuted and sentenced to death.[61] Because the court validated his plea agreement,[62] Brown asserted a violation of double jeopardy and argued that prosecution should be barred.[63] Although jeopardy attached to the "negotiated and conditioned" plea agreement, the Florida

52. United States v. Reardon, 787 F.2d 512, 516 (10th Cir. 1986) (both sides can withdraw from a plea agreement after establishing that the defendant lied in the course of bargaining); United States v. Brooks, 670 F.2d 625, 627 (5th Cir. 1982) (The government is not bound by the original plea agreement when a defendant, after agreeing to help the authorities in apprehending an individual, refuses.).

53. *See supra* note 34 and accompanying text.

54. *See infra* note 113 and accompanying text.

55. *Adamson*, 107 S. Ct. 2680.

56. The Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262.

57. The Tenth Circuit held that a "defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement." United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir. 1981), *cert. denied*, 451 U.S. 1018 (1982).

58. 367 So. 2d 616 (Fla. 1979).

59. *Id.* at 617. It appears that this is the first case to address this question. The *Brown* court stated that "no authority has been brought to our attention as to the double jeopardy effect of a nonconsensual vacation of a guilty plea because the defendant refused to perform a condition of his plea bargain." *Id.* at 621.

60. In return for his testimony, Brown was only charged with second degree murder. *Id.* at 619.

61. *Id.*

62. *Id.* at 620.

63. *Id.*

Supreme Court recognized the contractual nature of plea agreements and allowed the state to prosecute.[64]

Following the lead of the Florida Supreme Court, a Florida appeals court ruled in *Lerman v. Cornelius*[65] that *Brown* applied when the parties conditioned a plea agreement on the good behavior of the defendant.[66] The defendant in *Lerman* violated the plea agreement and did not advise the court of his arrest following the agreement and prior to sentencing.[67] Therefore, double jeopardy did not bar prosecution.[68]

Similarly, in *Miller v. Swanson*,[69] the prosecutor and defense counsel agreed to a reduced sentence of life in prison in exchange for a plea of guilty to a lesser charge of second-degree murder in a first-degree murder case.[70] At the sentencing hearing, the judge sentenced the defendant to thirty years in prison.[71] Although the court accepted the defendant's guilty plea, and double jeopardy attached, the Florida Court of Appeals held that re-prosecution was permitted when the defendant neglected to tell the judge about the plea agreement.[72] This, according to the court, was effectively a breach of the plea agreement.[73]

These cases indicate that in Florida when a defendant enters into a conditional plea agreement, he can face prosecution on the original charge if the agreement is breached prior to sentencing.[74] This ensures plea agreements will remain useful by putting both prosecutors and defendants on notice that they will have to adhere to the terms of the agreements. This rule was extended beyond Florida when the Supreme Court recently addressed the question.[75]

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64. The court stated that "the double jeopardy clause does not bar the re-prosecution of an accused who willfully refused to perform a condition of a guilty plea which has been accepted by the trial court on that basis." *Id.* at 623.

65. 423 So. 2d 437 (Fla. Dist. Ct. App. 1982).

66. *Id.* at 439.

67. *Id.*

68. *Id.*

69. 411 So. 2d 875 (Fla. Dist. Ct. App. 1981).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id. But see* Johnson v. State, 460 So. 2d 954, 959 (Fla. Dist. Ct. App. 1984), where a Florida appeals court held that double jeopardy did attach when the alleged breach was not a part of the agreement and therefore the state could not prosecute.

74. Although the rule in *Brown* is firmly entrenched in Florida jurisprudence as evidenced by the line of cases upholding the decision, it is unclear whether the rule applies after sentencing. In Acosta v. State, 489 So. 2d 63, 64-65 (Fla. Dist. Ct. App. 1986), the court indicated that *Brown* does not apply after sentencing but deferred to the Florida Supreme Court to answer the question since this would conflict with the holdings of most other courts in Florida. In a ruling of the certified question on the issue submitted by the appeals court, the supreme court held that it would not answer the controversy based on its finding that the defendant had not violated his plea agreement in the case. State v. Acosta, 506 So. 2d 387 (Fla. 1987). A concurring opinion answered the question in the affirmative, however, stating that "because this Court in *Brown* acknowledged that double jeopardy had attached when the trial court accepted the plea, it makes no difference here that [the defendant] had been sentenced before the state sought to reprosecute him for failure to abide by his plea agreement." *Acosta*, 506 So. 2d at 388 (Grimes, J., concurring).

75. *Adamson*, 107 S. Ct. 2680.

Expansion of the Exception

In *Adamson v. Superior Court*,[76] the Arizona Supreme Court came to a conclusion similar to that of the Florida courts. The defendant, John Harvey Adamson, was accused of murdering a newspaper reporter.[77] Adamson eventually entered into a plea agreement[78] which substantially reduced his sentence[79] in return for testimony against two alleged accomplices. After Adamson testified and was sentenced as provided by the agreement, the state asked Adamson to re-testify.[80] He refused, claiming he had already fulfilled the terms of his plea agreement.[81] In reviewing the plea agreement, the Arizona Supreme Court held that Adamson violated the agreement by not testifying and the double jeopardy clause did not bar his prosecution.[82] The court rejected Adamson's double jeopardy claim stating that the plea agreement constituted a waiver of those rights.[83]

After failing to obtain a writ of habeas corpus in federal court, Adamson was sentenced to death.[84] Adamson appealed again after sentencing and the Ninth Circuit granted his petition for habeas corpus holding that the state violated Adamson's double jeopardy rights.[85]

In *Ricketts v. Adamson*,[86] the United States Supreme Court overturned this ruling, holding that the state may prosecute a defendant who breaks a valid, conditional plea agreement after sentencing without violating the double jeopardy clause.[87] This decision extended the rule in *Brown* to the post-sentencing breach of a plea agreement. The Court reasoned that, although double jeopardy was not waived by name, an explicit waiver was

76. 125 Ariz. 579, 611 P.2d 932 (1980).

77. *Id.*

78. The agreement provided that Adamson would testify against "any and all parties involved in the murder of Don Bolles . . .," and that if he refused to testify at any time the state requested he would be subject to the original charges and could face life in prison or the death penalty. *Id.* at 582, 611 P.2d at 935.

79. Adamson was charged only with second-degree murder and was sentenced to forty-eight to forty-nine years in prison with a total incarceration time of twenty years and two months. *Adamson*, 107 S. Ct. at 2682-83.

80. *Id.* at 2683.

81. Adamson sent a letter to the state demanding additional consideration for the requested testimony claiming that under his interpretation of the agreement, "his obligation to provide testimony . . . had terminated when he was sentenced." *Id.*

The additional consideration Adamson requested was that he be released from prison, that he be held in non-jail facilities with protection during retrial, that he be given new clothing, that protection be provided for his son and ex-wife, that a college fund be set up for his son, that he be given "adequate resources" to establish a new identity outside Arizona following retrial and that he be granted "full and complete immunity for all crimes in which he may have been involved." *Id.* at 2683 n.2.

82. The Arizona Supreme Court held with "no hesitation" that Adamson violated his plea agreement. The court made its decision after reviewing many items of evidence including: the plea agreement, the transcripts of the plea hearing and the sentencing hearing, Adamson's letter to the state prosecutor, and the prosecutor's response to that letter stating that Adamson was in breach of the plea agreement. Adamson v. Superior Court, 125 Ariz. at 583, 611 P.2d at 936.

83. *Id.* at 584, 611 P.2d at 937.

84. Adamson's writ of habeas corpus was reviewed and rejected by the Ninth Circuit. Adamson v. Hill, 667 F.2d 1030 (9th Cir. 1981), *cert. denied*, 455 U.S. 992 (1982).

85. The court felt that an explicit waiver of double jeopardy was needed. Adamson v. Ricketts, 789 F.2d 722, 728 (9th Cir.), *cert. granted*, Ricketts v. Adamson, 479 U.S. 812 (1986).

86. 107 S. Ct. 2680 (1987).

87. *Id.*

not necessary.[88] Adamson adequately understood the terms of the agreement and the consequences of not adhering to its terms.[89]

The Court also relied on *Scott* to assert that a deliberate attempt by the defendant to overturn his conviction on a matter unrelated to guilt or innocence does not lead to the application of double jeopardy rights.[90] The double jeopardy clause was not designed to relieve a defendant of his voluntary decisions,[91] such as Adamson's decision to break his plea agreement.

THE EFFECT OF THE EXCEPTION ON DOUBLE JEOPARDY AND PLEA AGREEMENTS

Double Jeopardy

The double jeopardy clause is not a rigid, unyielding protection that prevails regardless of the surrounding circumstances.[92] The exceptions that have developed over the years, however, do not depart in principle from the foundations of the double jeopardy clause. The exceptions are designed to ensure that society is allowed a full and fair opportunity to determine the guilt or innocence of a defendant.

The Supreme Court has held that an important purpose of the double jeopardy clause is to protect a defendant from facing trial for the same offense twice.[93] In *North Carolina v. Pearce*,[94] the Court noted two specific instances when the protections against double jeopardy are especially important: protecting against re-prosecution for the same crime after acquittal and protecting against re-prosecution for the same crime after conviction.[95]

Prohibiting prosecution after acquittal is important to avoid erroneous convictions that might occur through continual prosecution of the accused if retrial were not barred.[96] Preventing retrial after conviction ensures that defendants will not be subject to multiple punishments,[97] which in turn

88. *Id.* at 2681.

89. The decision discusses areas in the agreement that specifically state the consequences Adamson would face if he did not fulfill the terms of the plea agreement, e.g., the agreement would be "null and void and the original charge automatically reinstated." *Id.* at 2682. The majority also points out that Adamson "unquestionably" understood the agreement. *Id.* at 2685. He answered "yes sir" to the judge each time he was asked whether he understood the terms of the agreement. *Id.* Therefore, no explicit waiver of double jeopardy was necessary. In contrast, the dissent considered the lack of an explicit waiver of the utmost importance. *Id.* at 2688 n.2.

90. *Adamson*, 107 S. Ct. at 2681. Adamson argued that he made a "good faith" argument regarding the interpretation of the plea agreement and therefore did not testify as requested. The Supreme Court stated that Arizona "did not force the breach; respondent chose, perhaps for strategic reasons or as a gamble, to advance an interpretation of the agreement that proved erroneous. And, there was no indication that respondent did not fully understand the potential seriousness of the position he adopted." Therefore, double jeopardy would not provide him any relief. *Id.* at 2686.

91. *Id.*

92. *See* United States v. DiFrancesco, 449 U.S. 117 (1980). "That the Clause is important and vital in this day is demonstrated by the host of recent cases. That its application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis." *Id.* at 127.

93. The Court stated in *Lyndon* that the double jeopardy clause is designed to protect "against a second prosecution for the same offense. . . ." *Lyndon*, 466 U.S. at 306. For an overview of double jeopardy analysis see *DiFrancesco*, 449 U.S. at 126-31.

94. 395 U.S. 711 (1969).

95. *Id.* at 717.

96. *See* Ohio v. Johnson, 467 U.S. 493, 498-99 (1984).

97. *Lyndon*, 466 U.S. at 307.

keeps sentencing within the parameters set by legislatures.[98] The Court also recognized the interest of both the defendant and society in the "expectation of finality" as an important goal of double jeopardy.[99] Protecting the integrity of a final judgment ensures that decisions made by a trier of fact, based upon an impartial examination of the evidence, will be preserved and not easily disturbed.[100] Furthermore, it allows the defendant to proceed with his affairs without fear of re-prosecution.

Prosecution following a defendant's breach of a plea agreement will not jeopardize these important considerations because the defendant has never stood trial for the crimes charged. For a defendant facing trial, a tribunal reviews his case based upon the evidence and renders a final determination. When a defendant pleads guilty, however, he does not face trial. Furthermore, neither the defendant nor society has an expectation of finality under a plea agreement until all terms of the agreement are met, even if sentencing has already occurred. The defendant enters into a plea agreement based upon a voluntary decision and if the agreement is breached, double jeopardy should not bar prosecution.[101]

In *Scott*, the Supreme Court stressed the importance of protecting a defendant from facing the harmful elements of a trial twice.[102] A trial can result in the expenditure of large amounts of money, damage to an accused's reputation in the community, and negative psychological and physical consequences.[103] A defendant who pleads guilty is not subject to trial. Therefore, this goal of double jeopardy is not compromised by allowing a trial after a defendant breaches a plea agreement.

Each exception to the application of double jeopardy is subject to a prohibition preventing the prosecution from using a second trial to apply evidence that is discovered during the first trial.[104] Accordingly, a decision may be overturned and retrial barred when the prosecution did not obtain

98. *Johnson*, 467 U.S. at 499.

99. *Id.* The Court in *Arizona v. Washington* noted that the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' " 434 U.S. 497, 503 (1978) (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962)).

100. *See Bretz*, 437 U.S. at 33.

101. The societal interest in punishing those who have committed crimes is acknowledged by the courts as well. In *Washington*, 434 U.S. at 505, the Supreme Court outlined the importance of giving the state a full opportunity to prosecute a defendant. Double jeopardy considerations are balanced in light of the "societal interest" of punishing those who have committed crimes. Preventing double jeopardy from barring prosecution in cases where a defendant breaches a plea agreement upholds this interest. *See also Scott*, 437 U.S. at 93 (A defendant's rights must be balanced against the public's need to ensure "justice is meted out to offenders."); Banks v. State, 56 Md. App. 38, 45, 466 A.2d 69, 76 (1983) (It must be determined that the public interest is served so that justice will not be "thwarted.").

102. Quoting *Green*, 355 U.S. at 187-88, the Court stated that the goal of double jeopardy is to protect the defendant from the "embarrassment, expense and ordeal [of a second trial] compelling [the defendant] to live in a continuing state of anxiety and insecurity." *Scott*, 437 U.S. at 87.

103. United States v. Stearns, 707 F.2d 391, 393 (9th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984) (The double jeopardy clause is "protection from harassment and from the physical, psychological, and financial burdens of multiple trials.").

104. *DiFrancesco*, 449 U.S. at 128 ("[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own.").

sufficient evidence prior to the first proceeding.[105] The goals of this prohibition are to prevent the state from retrying defendants after unsuccessful prosecution due to insufficiency of evidence[106] and from continually prosecuting until enough evidence is obtained for a conviction.[107]

These goals can be met despite the application of the exception. The sufficiency of the evidence is not determined at the plea bargaining stage. Instead, the defendant is pleading guilty to a crime without exercising his right to a full trial. It is therefore immaterial whether the government has sufficient evidence for a conviction at the plea bargaining stage. Additionally, if there eventually is a trial the state could be barred from using any evidence obtained through the plea bargaining process that would not otherwise be discovered.[108] The trier of fact then can determine if sufficient evidence exists for conviction.

Plea Agreements

Plea agreements offer benefits to both the state and the defendant.[109] Courts recognize the advantages of plea bargaining in easing court dockets and aiding in a more effective judicial system.[110] Thus, requiring that plea agreements be honored is crucial to ensure that both parties will continue to benefit.

In *Bordenkircher v. Hayes*,[111] the Supreme Court approved the use of plea agreements despite prosecutorial advantage in bargaining stance.[112] The Court recognized that the defendant is offered a choice between accepting a plea agreement or taking his chances at trial. As the prosecutor's advantage in plea bargaining does not deter most defendants from entering into plea agreements, the exception is equally unlikely to deter defendants from entering into such agreements. Cases allowing the termination of a plea agreement following a defendant's breach are plentiful.[113] The determination of the existence of a breach is made very carefully to ensure the de-

105. *See Tibbs*, 457 U.S. at 41 (quoting Burks v. United States, 437 U.S. 1, 17 (1978)) ("The rule barring retrial would be 'confined to cases where the prosecution's failure is clear.' ").

106. *Burks*, 437 U.S. at 11 (double jeopardy applies to bar retrial if evidence was insufficient at the first trial); *Massey*, 437 U.S. at 24 (Insufficient evidence at the first trial bars retrial through the double jeopardy clause.).

107. *Tibbs*, 457 U.S. at 41 ("repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance").

108. Although this may seem a difficult concept to apply, a similar concept, the inevitable discovery doctrine, is successfully utilized in criminal law. *See* Nix v. Williams, 467 U.S. 431 (1984) (A murder suspect led police to the body of the victim and later challenged this evidence based on the assertion that the authorities violated his constitutional rights to get the information. The Supreme Court held that the evidence surrounding the discovery and condition of the body was admissible on the grounds that the body would inevitably or ultimately be discovered despite any constitutional violation.).

109. *See, e.g.*, Brady v. United States, 397 U.S. 742, 751-52 (1970).

110. *See supra* notes 32, 36 and accompanying text.

111. 434 U.S. 357 (1976).

112. The system of plea agreements, as discussed in *Bordenkircher*, clearly constitutes the forming of an adhesion contract that gives bargaining benefits to the prosecutor. *Id.* at 358.

113. *See, e.g., Reardon*, 787 F.2d at 516 (government may terminate a plea agreement when the defendant breaches); *Calabrese*, 645 F.2d at 1390 ("defendant's failure to fulfill the terms of a pretrial plea agreement relieves the government of plaintiff's reciprocal obligations"); State v. Fox, 34 N.C. App. 576, 578, 239 S.E.2d 471, 473 (1977) (When an accused fails to abide by his plea agreement the state is not bound by the terms of the agreement.).

fendant's interests are protected.[114] Many jurisdictions rule that a state may not unilaterally determine whether a plea agreement is breached. These courts recognize that to hold otherwise would invite unfairness to the accused and, accordingly, they mandate that only the judiciary can effectively establish whether a plea agreement is violated.[115] As long as defendants feel their plea agreements will be construed fairly, the exception will not significantly deter them from entering into mutually advantageous agreements.

In *Adamson*, the Supreme Court recognized a problem that may emerge if defendants are allowed to escape from the terms of their plea agreements; prosecutors will be reluctant to enter into such agreements and the agreements would effectively become unenforceable.[116]

If a prosecutor remains bound by an agreement even after a defendant breaches, knowing the judiciary will not allow prosecution, it would be anomalous to expect a prosecutor to depend on the plea bargaining process. Thus, no incentive will exist to pursue the judicially economic goals of plea agreements.

The broken plea agreement exception to the double jeopardy clause strengthens prosecutors' reliance on plea agreements because it enables them to prosecute defendants who do not abide by the terms of the agreements. By endorsing this exception, the Court preserves the beneficial aspects of

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114. Justice Brennan's dissent in *Adamson* stressed the significance of carefully analyzing broken plea agreements and outlined the importance of fairness to the parties. *Adamson*, 107 S. Ct. at 2691 (Brennan, J., dissenting). These elements, Justice Brennan argues, are important to ensure a defendant's due process rights are protected and to avoid arbitrary determinations. Despite Justice Brennan's arguments that Adamson did not receive a fair hearing and had in fact not broken his plea agreement, the majority in *Adamson* held that the documented voluntariness of Adamson's entry into the agreement and a fair post-breach interpretation by the Arizona courts was sufficient. *Id.* at 2681. *See also* Note, *supra* note 32, at 146-47, where the author outlines the requirements of due process in entering into a plea agreement and determining a breach. The author argues that an analysis of whether a defendant's due process rights are adhered to by the state is required before double jeopardy questions will be examined.

115. *Calabrese*, 645 F.2d at 1390 ("We believe that one requisite safeguard of a defendant's rights is a judicial determination, based on adequate evidence, of a defendant's breach of a plea bargaining agreement."); United States v. Simmons, 537 F.2d 1260, 1261-62 (4th Cir. 1976) (A prosecutor cannot make the decision whether there is a breach of a plea agreement.); Gamble v. State, 604 P.2d 335, 336-37 (Nev. 1979) (An evidentiary hearing is required to determine if a defendant breached the plea agreement.).

116. *Id.* at 2686. The Court stated that

> [t]he approach taken by the Court of Appeals [that double jeopardy precludes prosecution] would render [plea agreements] meaningless: first degree murder charges could not be reinstated against respondent if he categorically refused to testify after sentencing even if the agreement specifically provided that he would so testify, because, under the Court of Appeals' view, he never waived his double jeopardy protection.

Id. at 2686. The majority felt that Adamson had clearly waived his double jeopardy rights. *Id.* at 2685. The dissent argues that a waiver must be clearly stated in the plea agreement. *Id.* at 2693.

> The court in *Brown* articulated some of the same concerns as the majority in *Adamson*.
>
> [I]t is apparent what would follow from Brown's contention that the attachment of jeopardy mechanically bars subsequent prosecution. Both the state and criminal defendants would be discouraged from considering plea negotiations which contemplate the defendant's promise to testify in another case. The promise would be unenforceable by the state and therefore of little value to prosecutors. A defendant would be hesitant to enter into an agreement which required performance of his promise before he knew the bargain would be accepted by a judicial officer.

Brown, 367 So. 2d at 622. *See also* Sweetwine v. State, 42 Md. App. 4, 12, 398 A.2d 1262, 1269 (1979), where the court held that "if the prosecution cannot rely upon the plea bargain, the potential 'chilling effect' upon the very institution of plea bargaining could be devastating."

plea agreements and makes them a more effective tool to help administer heavy prosecutorial caseloads. Prosecutors are therefore likely to continue their strong reliance on plea agreements because of this exception.[117]

Adherence to the terms of plea agreements is necessary to ensure that the interests of the defendant and prosecutor are met. If adherence is compelled by courts, plea agreements will continue to lead to the prompt resolution of many criminal cases, thereby easing trial schedules and affording defendants more favorable disposition of their cases.[118]

IMPLICATIONS OF THE EXCEPTION

The Supreme Court's endorsement of the broken plea agreement exception to the double jeopardy clause gives states a freer hand in ensuring adherence to the terms of plea agreements. States can apply the *Adamson* holding to make certain the plea bargaining process remains effective. In striving to reach this goal, many states may embrace the rule. Others, however, might share the same concerns as Justice Brennan who suggested in *Adamson*[119] that defendants are much less likely to enter into plea agreements in the wake of this decision.[120] According to Brennan, defendants would enter plea agreements at great risk, with courts allowing prosecutors virtually unbridled latitude in interpreting agreements.[121] Some states, therefore, may be reluctant to embrace the exception.

Applying the rule, however, is likely to strengthen the effectiveness of plea agreements by allowing a breach to result in prosecution without the double jeopardy clause acting as a bar. The courts in both *Brown* and *Adamson* assert that plea agreements would serve little purpose without allowing the state to prosecute after breach.[122] Many cases allow a defendant to withdraw from a guilty plea if the state has not adhered to its obligations under the plea agreement.[123] Out of fairness, the defendant should face similar consequences. Under the broken plea agreement exception, defendants will have to fulfill the terms of their agreement if they expect to benefit from the plea bargaining process.

CONCLUSION

Although the concept of double jeopardy is an important one, many exceptions have emerged over the years.[124] This demonstrates that the

117. *See supra* note 32 and accompanying text. Based on the high number of cases resolved through plea agreements it is likely they will remain an important alternative to trials.

118. *See supra* note 36 and accompanying text.

119. Justice Brennan considered the majority opinion a disaster for defendants' rights and the concept of double jeopardy in general. *Adamson*, 107 S. Ct. at 2694 (Brennan, J., dissenting).

120. Justice Brennan stated that the majority opinion

> reflects a world where individuals enter agreements with the State only at their peril, where the Constitution does not demand of the State the minimal good faith and responsibility that the common law imposes on commercial enterprises, and where, in blind deference to state courts and prosecutors, this Court abdicates its duty to uphold the Constitution.

Id.

121. *Id.*

122. *See supra* note 116.

123. *See Santobello*, 404 U.S. 257.

124. *See supra* notes 22-31 and accompanying text.

double jeopardy clause is not an insurmountable prohibition restricting a state from prosecuting a criminal defendant twice.

Plea agreements have developed as an important aspect of the judicial system. In fact, today most criminal cases are disposed of by plea agreements.[125] This provides a more timely and efficient way of dealing with the enormous caseloads that face the judicial system.

When the prosecutor does not abide by the terms of a plea agreement, courts allow defendants to withdraw from such agreements in certain circumstances.[126] The Supreme Court recently adopted this approach in *Adamson* when it ruled that a state may, without violating the double jeopardy clause, prosecute defendants who have breached plea agreements.[127]

The *Adamson* holding will not disrupt the underlying purpose of the double jeopardy clause. Moreover, the exception strengthens plea agreements by encouraging adherence to such agreements. Any other conclusion would greatly impair the goals plea agreements and the plea bargaining process were meant to achieve.

125. *See supra* note 32 and accompanying text.
126. *See supra* note 34 and accompanying text.
127. *Adamson*, 107 S. Ct. at 2681.