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# COMMENTS

## THE DEFENDANT IN JEOPARDY—IS VIRGINIA UNIQUE?

The constitutional and statutory safeguards against a person being twice placed in jeopardy for the same offense are well known both to laymen and lawyers alike. What has gone largely unnoticed by the Virginia courts is the applicability of the doctrine of *res judicata* to the area of criminal law. It is the purpose of this comment to make the reader aware of the doctrine of *res judicata* as it applies to criminal cases and to attempt to clear up the confusion which has developed in this area of Virginia law.

### I.

Jeopardy means the danger of conviction.<sup>1</sup> The doctrine of former jeopardy protects the right of a person not to be tried twice for the same offense by prohibiting a second trial.<sup>2</sup> The common law barred a second trial for the same offense, whether the accused had suffered punishment or not, if in the first trial he had been acquitted or convicted. The principle is expressed in the Latin phrase, "Nemo debet bis puneri pro uno delicto."<sup>3</sup> This safeguard against "twice in jeopardy" is provided both by the United States Constitution<sup>4</sup> and the Virginia Constitution,<sup>5</sup> as well as by Virginia statutes.<sup>6</sup>

Traditionally, Virginia has held that jeopardy attaches to a defendant at one of two times. Where the trial is by jury, the defendant is in jeopardy as soon as the jury has been empaneled and sworn;<sup>7</sup> where the trial is by

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<sup>1</sup> See *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933).

<sup>2</sup> See, e.g., *Commonwealth v. Perrow*, 124 Va. 805, 97 S.E. 820 (1919) and *Day v. Commonwealth*, 64 Va. (23 Gratt.) 915 (1873). This rule is also discussed in 2B MICHIE'S JUR., *Autrefois, Acquit and Convict*, § 7 at 339 (1970).

<sup>3</sup> See *Price v. Commonwealth*, 74 Va. (33 Gratt.) 819 (1880).

<sup>4</sup> U.S. CONST. amend. V.

<sup>5</sup> VA. CONST. art. I, § 8.

That in criminal prosecutions a man hath a right to . . . [not] be put twice in jeopardy for the same offense.

<sup>6</sup> VA. CODE ANN. § 19.1-257—19.1-259 (1950). The principal statute concerning former jeopardy in Virginia is § 19.1-257:

A person acquitted by the jury upon the facts and merits on a former trial, may plead such acquittal in bar of a second prosecution for the same offense. . . .

It is noted that while the statute specifically refers to an acquittal by jury, it is equally applicable to a trial without a jury. See *Adkins v. Commonwealth*, 175 Va. 590, 9 S.E.2d 349 (1940).

<sup>7</sup> *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933):

The general rule . . . is that when a person has been placed on trial, on a valid indictment, before a court of competent jurisdiction, has been arraigned,

judge without a jury, the defendant is in jeopardy at the instant the court begins to hear evidence.<sup>8</sup> If one were to stop at this point, Virginia would clearly be in accord with the majority view as to when jeopardy attaches to the defendant.<sup>9</sup> However, two Virginia cases seem to depart from this concept of when jeopardy attaches and to establish a new "time in jeopardy" which is unique to Virginia.

The first, *Commonwealth v. Perrow*,<sup>10</sup> involved the violation of an act passed by the General Assembly which authorized the Board of Supervisors of Buckingham County to place a license tax upon all labor agents coming into the county for the purpose of inducing local laborers to leave. Failure to pay this tax amounted to a misdemeanor. Perrow was charged under this act, but the warrant was quashed in the Circuit Court, and he was set free. In quashing the warrant, the court stated that the statute under which Perrow had been charged was unconstitutional. The Commonwealth then sought a writ of error, but the court denied this request.<sup>11</sup> In so ruling, the court held that the avowed purpose of the appeal sought by the state was to obtain a reversal of the judgment, to the end that the accused might be again brought to trial and that no appeal could lie if the rule against a second jeopardy was to apply.<sup>12</sup> In effect, what the court said was that even though no jury had been sworn and no evidence had been heard, the defendant had been in jeopardy; and to allow an appeal by the state would result in the defendant being twice in jeopardy for the same offense.<sup>13</sup>

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has pleaded, and a jury has been empaneled and sworn, he is in jeopardy. *Id.* at 1031-32.

See, e.g., *Commonwealth v. Willcox*, 111 Va. 849, 69 S.E. 1027 (1911); *Dulin v. Lillard*, 91 Va. 718, 20 S.E. 821 (1895).

<sup>8</sup> *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933):

In so far as the accused is concerned this danger exists and is just as real when he [the defendant] is being tried by the court without a jury as it is when he [the defendant] is being tried by a jury. . . . In a trial before a court without a jury the danger of conviction or jeopardy of an accused begins when the trial has reached the stage where the Commonwealth begins to introduce its testimony. That stage in such a trial is equivalent to the swearing of the jury when the accused is tried by jury. *Id.* at 1036.

<sup>9</sup> 21 AM. JUR. 2d *Criminal Law* § 175 (1965); 22 C.J.S. *Criminal Law* § 241 (1961):

As a general rule, . . . jeopardy attaches only when the trial commences; if the trial is to a jury, jeopardy attaches when all valid proceedings have been completed up to and including the swearing of the jury; and if the trial is to the court without a jury, jeopardy attaches when the court begins to hear the evidence. *Id.* at 636.

<sup>10</sup> 124 Va. 805, 97 S. E. 820 (1919).

<sup>11</sup> Under the VA. CONST. art. VI, § 1, the Commonwealth may be granted an appeal only in a case involving the violation of a law relating to the State revenue.

<sup>12</sup> 124 Va. at 811.

<sup>13</sup> That the *Perrow* court based its decision on principles of former jeopardy is evident from the language of the court's decision:

When the purpose of an appeal in a criminal case is to procure on behalf of

The decision in *Perrow* remained unnoticed for twenty-one years until the court in *Adkins v. Commonwealth*<sup>14</sup> based its conclusions thereon. In *Adkins*, an unmarried man was indicted on charges of bigamy and as an accessory to the crime of bigamy. The defendant demurred to the indictment on the ground that as a matter of law an unmarried man was not included within the language of the statute defining bigamy and could not be an accessory to this crime. The trial court erroneously sustained the demurrer, holding that as a matter of law an unmarried man could not be an accessory to the crime of bigamy, and ordered that the defendant be discharged. When arraigned upon a second indictment charging him with aiding and abetting in the crime of bigamy, the defendant filed a plea of "autrefois acquit" (former jeopardy). The court, citing *Perrow*, held that the plea was good, as the order discharging the accused was an ultimate decision upon a question of law.<sup>15</sup>

Thus, it appears that *Perrow* and *Adkins* have established a new time in jeopardy, holding that jeopardy attaches to the person of the accused whenever there has been an ultimate decision by the court upon a question of law, even though no jury has been sworn or evidence admitted.<sup>16</sup> Per-

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the State a reversal of the judgment and a new trial of the accused . . . the rule against a second jeopardy for the same offense operates *proprio vigore* to destroy the right of appeal. *Id.* at 811.

In setting forth the rule of this case the court stated:

. . . [T]he spirit and purpose of the immunity intended to be secured by the doctrine in question will be violated whenever a defendant in any criminal case has been tried by competent authority . . . and discharged upon a defense constituting a bar to the proceeding, whether that defense be rested upon the law or the facts. *Id.* at 815.

Such a rule is clearly contrary to the majority rule, stated in note 9 *supra*, as to when jeopardy attaches.

It should be further noted that while the *Perrow* court speaks in terms of jeopardy, that same court states a principal of *res judicata* (collateral estoppel) to support its decision that the defendant had been twice in jeopardy:

[A]s a general rule, the State has no right to a writ of error or an appeal from a judgment in favor of a defendant, whether upon a verdict of acquittal or upon the determination by the court of a question of law, unless it be expressly conferred by statute. . . . *Id.* at 815.

<sup>14</sup> 175 Va. 590, 9 S.E.2d 349 (1940).

<sup>15</sup> The demurrer was not sustained by the court because the indictment was defective in form. On appeal it was held that the lower court's ruling on the demurrer was an ultimate decision upon a question of law and that the decision of *Commonwealth v. Perrow* was controlling. 175 Va. at 596.

<sup>16</sup> As in *Perrow*, the court in *Adkins* again evidences confusion in distinguishing between former jeopardy and *res judicata*. While speaking in terms of former jeopardy and citing *Perrow* as authority, the court proceeds to state in the very next paragraph a principle of *res judicata* (collateral estoppel):

A fact once determined by a court of competent jurisdiction in a criminal proceeding cannot again be litigated between the same parties unless a different rule applies in criminal proceedings from that which obtains in civil proceedings

haps this might be acceptable as a broadening of the doctrine of former jeopardy in Virginia, except for the holding in *Commonwealth v. Willcox*,<sup>17</sup> a case decided eight years before *Perrow*, which went unnoticed both by *Perrow* and *Adkins*.

In the *Willcox* case, a judge at a primary election was indicted for knowingly and corruptly causing to be placed upon the official poll books the name of a person as having voted in said election when that person in fact had not voted. The defendant appeared and demurred to the indictment, claiming that the statute under which he was indicted was null and void as repugnant to the constitution. The court sustained the defendant's demurrer on this ground and dismissed the accused. The Commonwealth then applied for a writ of error in order to appeal the case, but the court properly denied this.<sup>18</sup> However, in setting forth its reason for denying the writ of error, the court stated that although no writ of error was proper in the case, the accused, having never been in jeopardy, could be again indicted and tried for this same offense by the state.<sup>19</sup> Thus, this court, prior to the holding in *Perrow*, determined that a final decision upon a question of law by the court did not amount to jeopardy, a holding contra to both *Perrow* and *Adkins*.

At this point it would seem that Virginia is in a hopeless state of confusion as to whether or not the adjudication of a question of law in the defendant's favor constitutes jeopardy. Yet it seems only fair that the defendant, having once had a question of law decided in his favor by a court of competent jurisdiction, should not be subject to a relitigation of this question. Thus, a dilemma arises because the defendant deserves protection even though he is not in a position to plead former jeopardy under

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but it is well settled that the rule is the same in both classes of cases. 175 Va. at 597.

To add to the confusion, the rule in *Adkins* is cited as an annotation to the Virginia former jeopardy statute, VA. CODE ANN. § 19.1-257 (1950). Also MICHIE'S JURISPRUDENCE, the Virginia-West Virginia encyclopedia of law, discusses both *Perrow* and *Adkins* in the section dealing with former jeopardy. See 2B MICHIE'S JUR., *Autrefois, Acquit and Convict*, § 7 at 339-40 (1970).

<sup>17</sup> 111 Va. 849, 69 S.E. 1027 (1911).

<sup>18</sup> See note 11 *supra*, for the reason of the court.

<sup>19</sup> In rendering its opinion the court stated:

The indictment was demurred to by the defendants, the demurrer was sustained, and the indictment was dismissed. The accused were never in jeopardy, and may be again indicted and tried for the offense whereof they are accused, if the Commonwealth shall be so advised. 111 Va. at 852.

The court then followed the majority rule as to when jeopardy attaches:

And we may say . . . : The accused have never been put upon their trial, no jury has ever been charged with their deliverance, and they have, therefore, never been in jeopardy with respect to the offense of which they are accused. 111 Va. at 853.

the two recognized instances as to when it attaches.<sup>20</sup> This dilemma is resolved by the application of the doctrine of res judicata in the area of criminal law.

## II.

The plea of res judicata should be distinguished from the technical defense of "former acquittal" and "former conviction." These latter defenses are not based on the doctrine of res judicata, but on the rules against double jeopardy.<sup>21</sup> Although the applicability of the principle of res judicata in criminal cases has long been recognized, there is reason to believe that its availability has not been generally appreciated. It appears that in some jurisdictions the issue has never, or has only recently, been presented to the courts and that many treatises and casebooks in the field of criminal law make little or no mention of its importance.<sup>22</sup> It is not the purpose of this comment to explore completely res judicata as it applies to criminal cases,<sup>23</sup> but rather to make the reader aware of its existence and its possible application in specific instances when the plea of former jeopardy would not be applicable.

Although for a long time there was great confusion as to whether the doctrine of res judicata could be applied to criminal cases, this question was finally settled by the landmark case of *United States v. Oppenheimer*.<sup>24</sup> In that case the court rejected the contention that the doctrine of res judicata applied to criminal cases only in the modified form of the protection against being twice placed in jeopardy. Oppenheimer had been indicted for conspiracy to conceal assets from a trustee in bankruptcy. He then claimed that the offense was barred by the one year statute of limitations provided for in the bankruptcy act. The trial court erroneously upheld this defense, and the defendant was released. The state then sought to reindict the accused after learning that the statute of limitations had not in fact run, but the Supreme Court held that the decision in the trial

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<sup>20</sup> See notes 7, 8 and 9 *supra*.

<sup>21</sup> Annot., 9 A.L.R. 3d 203, 210 (1966).

<sup>22</sup> See Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954).

The question of the applicability of res judicata in the area of criminal law has attracted the attention of many legal writers. See, e.g., Garshenson, *Res Judicata in Successive Criminal Prosecutions*, 24 BROOKLYN L. REV. 12 (1957); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 874 (1952); *Res Judicata and Double Jeopardy in Indiana Criminal Procedure*, 33 IND. L. J. 409 (1958); *Res Judicata in Criminal Cases*, 27 TEX. L. REV. 231 (1948); Note, *Twice in Jeopardy*, 75 YALE L. J. 262, at 283-86 (1965).

<sup>23</sup> For a thorough examination of this subject see materials cited in notes 21 and 22 *supra*.

<sup>24</sup> 242 U.S. 85 (1916).

court below was *res judicata* as to the issue of law there decided.<sup>25</sup> There have been later cases following *Oppenheimer*, all standing for the proposition that the fifth amendment, in providing against double jeopardy, was not intended to supplant or abrogate in criminal cases the fundamental common law principle of *res judicata*.<sup>26</sup>

*Res judicata*, as understood in civil cases, may take one of three forms—merger, bar, or estoppel.<sup>27</sup> As applied in criminal cases the primary significance of the doctrine of *res judicata* lies in its operation as collateral estoppel.<sup>28</sup> Collateral estoppel bars relitigation between the same parties of

<sup>25</sup> Upon the merits the proposition of the Government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offence to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offence charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue, . . . but if upon a special plea of the statute, permits the defendant to be prosecuted again.

The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . . , in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time. 242 U.S. at 87-88.

While *Oppenheimer* concerned the Court's upholding of the lower court's ruling that the statute of limitations had run, the Court stated as dicta at p. 87: "We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words." It is submitted that the rule of *Oppenheimer* should have been applied in both *Ferrow* and *Adkins*, since in both cases the defendants were never in jeopardy in the classical sense.

<sup>26</sup> See, e.g., *Collins v. Loisel*, 262 U.S. 426 (1923); *United States v. Marakar*, 300 F.2d 513 (3d Cir. 1962) *vacated on other grounds* 370 U.S. 723 (1962); *State v. Hentschel*, 98 N.H. 382, 101 A.2d 456 (1953).

<sup>27</sup> Annot., 9 A.L.R.3d 203 (1966):

With reference to judgments in civil cases, it has been said that the effect of a judgment as *res judicata* appears in at least three aspects. These are: (1) "merger," by which a judgment for the plaintiff merges his cause of action, so that the original cause of action is terminated and a cause of action on the judgment takes its place; (2) "bar," by which a judgment on the merits for the defendant terminates the original cause of action; and (3) "estoppel," by which questions of fact and perhaps of law actually litigated in the action are conclusively determined in subsequent actions in which the same questions arise, even though the cause of action may be different. *Id.* at 213.

<sup>28</sup> *Id.* at 244.

issues of law or fact actually determined at a previous trial.<sup>29</sup> In most jurisdictions it is well settled that the doctrine of collateral estoppel is applicable in criminal cases.<sup>30</sup> Although there appears to have arisen some question among the courts as to whether the doctrine of collateral estoppel should apply to determinations of questions of law as well as fact, it is clear that the Supreme Court feels the doctrine should apply to questions of law as evidenced by its holding in *Oppenheimer*.<sup>31</sup> Therefore, even though the trial may not have progressed to the normal stages of jeopardy,<sup>32</sup> or, more importantly, the previous trial was for a different offense such that a plea of former jeopardy would be inappropriate,<sup>33</sup> any issue of fact or law finally decided in the prior proceeding would, by principles of collateral estoppel, be binding as between the parties.

In Virginia, case authority as to the applicability of collateral estoppel to criminal cases is sketchy at best, indicating the confusion which has

<sup>29</sup> Note, *Twice in Jeopardy*, 75 YALE L. J. 262, 283 (1965).

<sup>30</sup> See, e.g., *Hoag v. New Jersey*, 356 U.S. 464 (1958) (stating that although the doctrine of res judicata was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both state and federal courts); *Sealfon v. United States*, 332 U.S. 575 (1948); *United States v. Oppenheimer*, 242 U.S. 85 (1916); *Frank v. Mangum*, 237 U.S. 309 (1915); *Adams v. United States*, 287 F.2d 701 (5th Cir. 1961); *Wheatley v. United States*, 286 F.2d 519 (10th Cir. 1961); *Cosgrove v. United States*, 224 F.2d 146 (9th Cir. 1954); *United States v. Kaadt*, 171 F.2d 600 (7th Cir. 1948).

<sup>31</sup> See, e.g., *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961); *United States v. Morse*, 24 F.2d 1001 (S.D.N.Y. 1926); *State v. Humphrey*, 357 Mo. 824, 210 S.W.2d 1002 (1948); *People v. Brooklyn and Queens Transit Corp.*, 283 N.Y. 484, 28 N.E.2d 925 (1940); *State v. Barton*, 5 Wash.2d 234, 105 P.2d 63 (1940). The general rule as to whether the doctrine of collateral estoppel extends to questions of law is stated in RESTATEMENT OF JUDGMENTS § 70 (1942):

Where a question of law is actually litigated and determined in an action, the determination is ordinarily conclusive between the parties in a subsequent action involving the same subject matter or transaction, although based upon a different cause of action from that upon which the original action was based. *Id.* at 320.

<sup>32</sup> See note 9 *supra*.

<sup>33</sup> The difference between collateral estoppel and former jeopardy is discussed in Annot., 9 A.L.R.3d 203 (1966):

The doctrine of collateral estoppel by judgment (or verdict) is in some respects broader and in other respects narrower than the defense of double jeopardy. While both require identity of parties the plea of collateral estoppel by judgment (or verdict), as applied in criminal cases, and the defense of double jeopardy differ in the following respects: (1) the defense of double jeopardy is available even in the absence of a judgment, but the effect of collateral estoppel ordinarily attaches only to a judgment; (2) the defense of double jeopardy requires identity of offenses, but the doctrine of collateral estoppel does not; (3) the defense of double jeopardy, if successful, operates as a complete bar to another prosecution, while the defense of collateral estoppel does not necessarily so operate and may merely preclude the relitigation of certain issues; and (4) the federal and most state constitutions embody the defense of double jeopardy, whereas it is doubtful whether the application, in a proper case, of the doctrine of collateral estoppel is required by any constitutional provision. *Id.* at 221-22.



surrounded this area of law. In fact only two cases other than *Perrow* and *Adkins* (which were decided on principles of former jeopardy) have dealt with this subject. The first case is *Justice v. Commonwealth*.<sup>34</sup> In that case the court expressed doubt as to whether an estoppel by judgment could operate in a criminal case:

But the doctrine of estoppel, strictly speaking, is not applicable to the Commonwealth in a criminal prosecution. The nearest approach to it is the doctrine, founded on the maxim of the common law, that no one shall be twice put in jeopardy for the same offence.<sup>35</sup>

*Seymour v. Commonwealth*<sup>36</sup> moved Virginia away from the rigid position taken by *Justice* and seemed to leave the question open as to whether collateral estoppel could apply in criminal cases. The *Seymour* court held that, while *res judicata* or estoppel did not apply in the present case, it was not prepared to say that no case could possibly arise in which the doctrine of estoppel or *res judicata* could be invoked against the Commonwealth.<sup>37</sup>

This is the way Virginia law stood as to this subject until the court's decision in *Adkins*. Although *Adkins* cited *Perrow* (which was decided on principles of former jeopardy) as authority for its holding, at least one authority has included this case under the doctrine of *res judicata* as applied to criminal cases.<sup>38</sup> Such would seem to indicate that Virginia has moved one step farther from *Seymour* and would align itself with those authorities which hold that collateral estoppel may be applied in criminal cases to questions of law and fact.

### III.

It is most difficult to attempt to summarize the legal ramifications of *Perrow* and *Adkins* in a paragraph. At best, these two cases can be considered illustrations of hard cases making bad law. In each of these cases the Virginia court was seeking a way to prevent an injustice. In *Perrow* the trial court had determined that a statute was unconstitutional, while in *Adkins* the trial court had ruled as a matter of law that an unmarried man could not be an accessory to bigamy. In each case the state sought to retry the accused, claiming that the accused had never been in jeopardy. To allow the state to do this would be unfair, since a final adjudication of a

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<sup>34</sup> 81 Va. 209 (1885).

<sup>35</sup> *Id.* at 217.

<sup>36</sup> 133 Va. 775, 112 S.E. 806 (1922).

<sup>37</sup> *Id.* at 781.

<sup>38</sup> Annot. 9 A.L.R.3d 203 (1966).

question of law had already been made by the trial court in the defendant's favor in each case. In groping for a way to protect the rights of the accused, the court turned to the doctrine of former jeopardy, holding that both defendants had been in jeopardy and thus a second trial for the same offense was barred. Yet in rendering such a decision the court made no mention of the fact that it was overturning not only the majority<sup>39</sup> but the Virginia rule<sup>40</sup> as to when jeopardy attaches. The only explanation is that these two courts were guilty of a common error—they overlooked the doctrine of *res judicata* as applied to criminal cases in the form of collateral estoppel.

The *Willcox* case correctly stated the law in holding that the adjudication of a legal issue in the defendant's favor does not amount to jeopardy.<sup>41</sup> Applying the doctrine of collateral estoppel to *Perrow* and *Adkins*, the questions of law decided in the trial courts below would have been barred from relitigation and the defendants' rights protected. This should have been the theory of the *Perrow* and *Adkins* cases.<sup>42</sup> By deciding these cases on principles of former jeopardy, the courts served only to throw Virginia law into confusion. It is hoped that both the courts and attorneys in Virginia will now become fully aware of the doctrine of *res judicata* as applied to criminal cases and make use of it, when a plea of former jeopardy is clearly wrong.

F. T.

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<sup>39</sup> See note 9 *supra*.

<sup>40</sup> See notes 7 and 8 *supra*.

<sup>41</sup> See note 19 *supra*.

<sup>42</sup> The fact that the courts in both *Perrow* and *Adkins* state principles of *res judicata* in their decisions lends weight to this conclusion. See notes 13 and 16 *supra*.