

**PROSECUTION USE OF ESTOPPEL AND RELATED DOCTRINES
IN CRIMINAL CASES:**

PROMOTING CONSISTENCY, TOLERATING INCONSISTENCY

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I. INTRODUCTION

The law prefers that courts generate consistent rulings and outcomes in cases based on identical facts.¹ When related cases are tried separately or when a case is reassigned to a new judge, the risk

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1. See *Zafiro v. United States*, 506 U.S. 534, 537 (1992) (quoting *Richardson v. March*, 481 U.S. 200, 210 (1987)) (approving a joint trial to “promote efficiency and ‘serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts’”); see also Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 620-21 (2010) (discussing rules governing mandatory joinder and intervention in civil cases in relation to stare decisis and interest protection).

of inconsistent rulings arises.² To address that risk, the law has developed a number of doctrines that operate to encourage consistency: issue preclusion or collateral estoppel, res judicata or double jeopardy, the law of the case doctrine, and stare decisis. These doctrines operate differently when applied to criminal cases. For example, double jeopardy and collateral estoppel—the criminal procedure equivalents of res judicata and issue preclusion—sometimes take on constitutional force when invoked by a criminal defendant. However, when the prosecution invokes these consistency-promoting doctrines against the criminal defendant, these doctrines are sometimes restricted by concerns such as fairness to the defendant. This Article focuses on prosecutorial use of these consistency-promoting doctrines against the defendant in criminal cases—examining their appropriate role and discussing the limitations that should apply.

Once an issue has been resolved against a criminal defendant, the prosecution will generally want to enforce that ruling against the defendant and will turn to the consistency-promoting doctrines to foreclose the defense's efforts to relitigate the issue. Consider the circumstances in which the prosecution's effort to bar relitigation and avoid the risk of inconsistent rulings may arise. In *Laaman v. United States*, a group of domestic terrorists committed criminal acts in New Jersey, New York, and Massachusetts.³ The defendants were arrested in Ohio, in a house filled with guns and explosives, but the first round of federal charges were brought in New York. In the initial proceeding, the defendants moved to suppress evidence based on alleged Fourth Amendment violations at the time of the Ohio arrest. The court denied the motions, and the defendants were convicted. The Second Circuit affirmed the convictions on appeal, holding that the defendants' Fourth Amendment rights had not been violated.⁴ The defendants then faced a second round of charges in federal court in Massachusetts. In that case, the prosecution argued that the Second Circuit ruling barred the defendants from raising the Fourth Amendment challenge.⁵ The district court agreed and did not allow the defendants to relitigate the grounds for suppression

2. See 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.1, at 694-703 (2d ed. 2002) (discussing pressures for and against reconsideration of earlier rulings when a case is assigned to a new judge).

3. 973 F.2d 107 (2d Cir. 1992).

4. *United States v. Levasseur*, 816 F.2d 37 (2d Cir. 1987), *post conviction relief denied sub nom.* *Curzi v. United States*, 773 F. Supp 535 (E.D.N.Y. 1991), *aff'd sub nom.* *Laaman v. United States*, 973 F.2d 107 (2d Cir. 1992).

5. See *United States v. Curzi*, 867 F.2d 36, 37 n.1 (1st Cir. 1989) (noting that the government relied on collateral estoppel but later abandoned its collateral estoppel theory without explanation).

considered and rejected in the New York case. The court permitted the defendants to raise new legal arguments, however, and granted the motion to suppress as to two defendants.⁶ After the defendants prevailed on their Fourth Amendment arguments in the First Circuit, they returned to the district court in New York, seeking post-conviction relief, building on the arguments that had succeeded in the First Circuit. The district court denied the petitions, and the defendants appealed.⁷ The Second Circuit emphatically rejected the argument that the First Circuit holdings had preclusive effect.⁸ As a result, inconsistent rulings in these closely related cases were allowed to stand. In one case the prosecution could use the evidence, but in the other, it could not.

The criminal justice system is not as evenly balanced as the civil system given the special protections that shield criminal defendants. Specifically, criminal defendants benefit from four constitutional protections that potentially create an imbalance in outcome. First, the prosecution must establish guilt beyond a reasonable doubt, and the defendant, correspondingly, need only raise a reasonable doubt to be acquitted. Second, double jeopardy protection bars the government from challenging an acquittal, even if it appears to result from an error in the trial court.⁹ Third, if an acquittal resolves an issue in the defendant's favor, constitutionally-based collateral estoppel bars the

6. See *United States v. Levasseur*, 699 F. Supp. 965 (D. Mass. 1988), *rev'd in part on other grounds*, 846 F.2d 786 (1st Cir. 1988). The First Circuit affirmed the ruling in *Curzi*, 867 F.2d at 37 n.1.

7. *Laaman*, 973 F.2d at 112.

8. The court stressed the nature of collateral estoppel: the doctrine turns not on the correctness of the first ruling but on the finality of a ruling after full and fair opportunity to convict. See *id.* at 113. The court emphasized that a prior decision on a motion to suppress can be revisited by a different court only if there is substantial new evidence or some extraordinary circumstance. The court declined to give preclusive effect to the First Circuit rulings. The court explained:

[W]hether or not the district court in the District of Massachusetts should have accorded preclusive effect to the prior rulings in this circuit regarding suppression of the evidence seized from the Cleveland Residence, we regard those rulings as an extraordinary circumstance that relieves us of any obligation to give binding effect to the First Circuit determinations.

Id.

9. See 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 25.3(c), at 633-34 (3d ed. 2010) (“[D]ouble jeopardy bars reprosecution following judicial termination of a trial by directed acquittal, without regard to whether the judicial determination as to the insufficiency of the evidence is based on its total lack of its persuasiveness, its failure ‘as a matter of law’ due to the substantive content of the offense in question, or an erroneous decision to exclude essential proof.”). This protection was strengthened in *Yeager v. United States*, 129 S. Ct. 2360 (2009), where the Court held that an acquittal has preclusive effect even though the jury’s inability to reach a verdict on other charges was inconsistent with the acquittal. *But see* Lissa Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases*, 63 SMU L. REV. 1033, 1060-66 (2010) (criticizing *Yeager*).

government from relitigating the issue.¹⁰ Fourth, the defendant has the right to have a jury trial on all the elements of the offense.¹¹ As a result of these protections, the defendant can sometimes bar the prosecution from seeking a conviction that would be inconsistent with an earlier outcome.

However, the defendant's ability to insist on consistency is also limited. If a jury in a single trial returns inconsistent verdicts against the defendant, the verdicts will be allowed to stand despite the inconsistency.¹² Further, a criminal defendant cannot successfully invoke a different defendant's favorable ruling in an accomplice's related case even though that ruling reflects the resolution of issues that would preclude the defendant's conviction.¹³

Within the parameters defined by these rights and restrictions, courts seek to achieve an appropriate level of consistency in rulings and results. This Article examines the extent to which the prosecution can enforce consistent results within a single case or among related cases.¹⁴ Prosecutors, and sometimes courts, search for

10. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *see also* *United States v. Bailin*, 977 F.2d 270, 275-77 (7th Cir. 1992) (applying collateral estoppel after mixed verdicts of acquittal and mistrial in multicount case to bar government from relitigating issues resolved by acquittals).

11. *See* *United States v. Gaudin*, 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged . . ."); *see also* 6 LAFAVE, *supra* note 9, § 22.1 (discussing the right to trial by jury).

12. *See, e.g.*, *People v. Superior Court of Yuba Cnty.*, 224 P.3d 86, 89-91 (Cal. 2010) (discussing inconsistent verdicts and rejecting defendant's argument that inconsistency should be ground for relief); Griffin, *supra* note 9, at 1048-50 (discussing acceptance of inconsistent verdicts). *United States v. Agofsky*, 516 F.3d 280, 284 (5th Cir. 2008) (internal citations omitted), summarized the reasoning behind the inconsistent verdict rule:

As the Supreme Court noted in *Powell*, inconsistent verdicts present "error," in the sense that the jury has not followed the court's instructions . . . but it is unclear whose ox has been gored." Because of "this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course." The court reasoned, "the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest." Moreover, "[t]his possibility is a premise of *Dunn's* alternative rationale—that such inconsistencies often are a product of jury lenity." Accordingly, "[t]he fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable."

13. *See, e.g.*, *Quilopras v. Yates*, No. C 05-04516 JW, 2009 WL 5108399, at *6-7 (N.D. Cal. Dec. 18, 2009) (concluding that the state reasonably denied collateral estoppel effect to acquittal of accomplice whom defendant was charged with aiding and abetting).

14. The emphasis on consistency is also registered in habeas cases. While there was a period of time when federal courts often reviewed issues underlying state court

ways to avoid reevaluating an issue already addressed by the justice system by applying rules that make the previous resolution determinative. They should not do so at the expense of the fairness of the process to the defendant. This Article considers four doctrines that may be employed to achieve that result: collateral estoppel, res judicata, law of the case, and stare decisis. As to each of these doctrines, questions arise concerning the prosecution's ability to invoke them offensively in order to restrict a criminal defendant's freedom to litigate previously considered issues. Section II discusses each of the doctrines and considers the ways in which they operate differently in criminal cases.

Section III examines particular issues on which the prosecution may seek to enforce consistency and discusses the counterbalancing concerns that may weigh against permitting the prosecution to invoke these doctrines against the defendant. This Article concludes that the application of these consistency-promoting doctrines must be tempered to ensure the fairness of the process. Subsection A discusses motions to suppress and concludes that the prosecution should often, but not always, be able to treat a favorable ruling as law of the case and limit the defendant's ability to relitigate the issue once a court has resolved the issue. Subsection B considers the effect of evidentiary rulings on later litigation and concludes that, with limited exceptions, the consistency-promoting doctrines should not apply. Subsection C discusses the application of consistency-promoting doctrines to other nonevidentiary motions and discusses the circumstances in which the prosecution can restrict further litigation of a decided issue.

Subsection D addresses an area in which some prosecutors and courts go too far in pursuit of consistency—the use of collateral estoppel to bar the defendant from litigating further an issue of guilt/innocence. For example, suppose a defendant is convicted of burglary and first degree felony-murder on the basis of the burglary and, on appeal, the court affirms the burglary conviction but reverses the murder conviction, remanding the murder charge for retrial. The

convictions de novo, the law now reduces the likelihood that the prosecution will lose the benefit of a favorable state ruling on federal habeas review. Even before Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996), the Supreme Court had reduced the opportunity for a criminal defendant to persuade a federal court to undo an adverse state ruling. See generally Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888 (1998). Application of the consistency doctrines in habeas cases is driven by different concerns and is therefore beyond the scope of this Article. See generally 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE §§ 4265, 4267 (3d ed. 2007) (discussing the application of state court findings and res judicata to habeas proceedings); 18B WRIGHT, *supra* note 2, §§ 4478, 4478.4, at 214-15 n.12, 280 n.34 (3d ed. Supp. 2011) (discussing the application of doctrines in habeas proceedings).

prosecution does not want to have to reprove the burglary and argues that collateral estoppel bars the defendant from contesting that he committed the burglary. The prosecution asks the trial court to instruct the jurors that the defendant was convicted of the burglary and that they should take that fact as proven.¹⁵ This Article argues that the Constitution prohibits this use of collateral estoppel and, further, that the prosecution should not even be permitted to introduce evidence of the prior conviction.

Section IV discusses a further limitation on the prosecution's pursuit of consistency, arguing that the consistency-promoting doctrines should not be used to achieve consistency between different defendants. For example, if one defendant moves to suppress and loses, a defendant in a related case should not be bound by that unfavorable ruling. Each defendant is entitled to fully litigate all issues in their own case without regard to the resolution of related issues in a codefendant's case.

II. THE DOCTRINES

Four consistency-promoting doctrines are applied in criminal cases: collateral estoppel, res judicata, law of the case, and stare decisis. All four promote consistency in outcome by limiting relitigation that might produce a different legal outcome despite the presence of similar facts. All four doctrines are grounded in the same set of policies; by promoting consistency, they foster the integrity of the justice system. In addition, they serve the interests of efficiency and resource conservation by foreclosing or limiting relitigation of previously resolved issues.

Before going further, it is worth noting that courts sometimes conflate these doctrines and that terminology in this area is sometimes confusing.¹⁶ In criminal cases, there is a significant distinction between the defensive and offensive use of consistency-promoting doctrines.¹⁷ For example, defensive use refers to the

15. This hypothetical is based on the facts of *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005), in which the trial court applied collateral estoppel against the defendant, but the appellate courts disallowed the prosecution's use of collateral estoppel.

16. 18B WRIGHT, *supra* note 2, § 4478, at 644-45 (noting that courts sometimes "absent-mindedly refer to res judicata to support law-of-the-case conclusions, or rely on law-of-the-case expressions to support conclusions that might better rest on some other preclusion theory") (footnotes omitted); *see, e.g.*, *State v. Ramirez*, 921 A.2d 702, 711-12 (Conn. App. Ct. 2007) (stating that it was applying "res judicata, or claim preclusion" when it gave preclusive effect to a ruling on an issue raised in a motion to suppress that had been litigated and ruled on, failing to recognize that it was applying collateral estoppel, or issue preclusion); *see also* 18 WRIGHT, *supra* note 2, § 4402, at 7-20 (2d ed. 2002) (discussing terminology regarding res judicata).

17. *See* Donald L. Catlett et al., *Collateral Estoppel in Criminal Cases: How and Where Does it Apply?*, 62 J. MO. B. 370 (2006) (discussing appropriate use of defensive collateral estoppel in a criminal context and advocating against offensive use of the

defendant's use of the doctrine to bar the government from relitigating a previously determined issue.¹⁸ Offensive collateral estoppel refers to the government's use of the doctrine to foreclose relitigation of an issue decided adversely to the defendant. This Article focuses on the offensive use of these doctrines.

When invoked by the defendant, aspects of collateral estoppel and res judicata are often grounded in the constitutional protection against double jeopardy. In those instances, the protective doctrine does not apply unless jeopardy attached in the earlier proceeding.¹⁹ However, this limitation does not apply at all to prosecution use of the doctrines and does not limit either party's use of the policy-based aspects of the four doctrines. The application of these doctrines goes far beyond the limited constitutional rules that protect the defendant. When not based in the Constitution, the doctrines must be justified by the same policies underlying civil use of issue preclusion.

In criminal cases, the enforcement of these doctrines is affected by countervailing policy considerations and, in some cases, the policy considerations favoring consistency-promoting doctrines must give way to stronger interests.²⁰ When the prosecution invokes one of these doctrines to limit the defendant's ability to litigate further, the rights of the individual criminal defendant, along with the public interest in the enforcement of the criminal law and in the accuracy

doctrine in a criminal context).

18. See *Ashe v. Swenson*, 397 U.S. 436, 443-45 (1970) (using collateral estoppel to bar the second prosecution of a robbery); see also Allan D. Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 284 (1980) (discussing basis for issue preclusion in criminal cases). When the protection is based in double jeopardy, it may not operate if jeopardy did not attach at the first proceeding. See 5 LAFAVE, *supra* note 9, § 17.4(a), at 59-79 (discussing collateral estoppel). This requirement, limited to the application of constitutionally-based collateral estoppel and double jeopardy protection, sometimes generates confusion. Courts occasionally overlook the fact that a defendant can invoke policy-based collateral estoppel protection even if the defendant was never in jeopardy. See, e.g., *State v. McCord*, 402 So. 2d 1147, 1149 (Fla. 1981) (holding that collateral estoppel did not preclude prosecution from relitigating motion to suppress because charges had been dismissed, so jeopardy had not attached). *But see* *People v. Williams*, 322 N.E.2d 461, 463-64 (Ill. 1975) (applying collateral estoppel to prevent prosecution from relitigating suppression issue ruled on before jeopardy attached). *State v. Smiley*, 943 S.W.2d 156 (Tex. Ct. App. 1997), illustrates this confusion. In *Smiley*, the court held, over dissent, that the defense could not rely on a favorable ruling at a license suspension hearing to bar the State from litigating a subsequent criminal prosecution for driving while intoxicated. The defendant relied only on constitutional collateral estoppel and did not raise policy-based protection. As a result, the fact that the earlier proceeding had not placed the defendant in jeopardy was fatal to the claim of collateral estoppel. *Id.* at 156-60.

19. See 5 LAFAVE, *supra* note 9, § 17.4(a), at 60 (explaining that collateral estoppel is grounded in the Fifth Amendment).

20. *Standefer v. United States*, 447 U.S. 10, 21-25 (1980).

and fairness of criminal proceedings, must also be placed in the balance. These interests sometimes outweigh the policy justifications for the doctrine.²¹

A. *Collateral Estoppel*

Collateral estoppel is the term still generally used in criminal cases to refer to issue preclusion.²² This doctrine promotes consistent application of the law and resolution of factual questions by barring relitigation of an issue finally resolved in earlier litigation.²³ Four well-established criteria must be satisfied for collateral estoppel to apply. First, the issue must have been finally decided on its merits in a previous proceeding. Second, the previously decided issue must be identical to the issue raised in the later proceeding. Third, the party against whom the doctrine is invoked must have been a party to the prior proceeding. Finally, the party against whom the doctrine is invoked must have had a full and fair opportunity to litigate the issue in the prior proceeding.²⁴ Thus, collateral estoppel only comes into play after a final determination of an issue,²⁵ and it is usually restricted to issues that have actually been litigated.²⁶ Indeed, the

21. In some cases, even though none of these doctrines provide a basis for achieving a consistent approach, the court may nevertheless find a way to ensure consistency. *See, e.g.*, *United States v. Thoresen*, 428 F.2d 654, 667 (9th Cir. 1970). Thoresen's motion to suppress had been denied, but the prosecution then obtained a superseding indictment. The prosecution argued that Thoresen was foreclosed from relitigating the suppression issues, although his codefendant/wife was not. The court did not determine whether either collateral estoppel or law of the case foreclosed relitigation of the issue by the defendant. Instead, to avoid a possible inconsistent result as to the codefendants, the court concluded that "fairness dictates that Thoresen should have the benefit of any favorable determination his codefendant may gain therefrom." *Id.* at 667.

22. The most commonly cited definition is found in *Ashe v. Swenson*:

"Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply 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 in any future lawsuit.

397 U.S. at 44. *See also* 18 WRIGHT, *supra* note 2, § 4420, at 525-28 (2d ed. 2002) (discussing application of collateral estoppel after acquittal); Griffin, *supra* note 9, at 1037-41 (discussing collateral estoppel); Vestal, *Issue Preclusion*, *supra* note 18, at 282-85 (discussing *Ashe* and the development of issue preclusion in criminal cases).

23. *See* Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 HOUS. L. REV. 875, 914-15 (1987) (discussing the importance of collateral estoppel as a means of promoting consistency).

24. Vestal, *supra* note 18, at 288-89 (discussing requirements).

25. *Cook v. State*, 381 A.2d 671, 673-74 (Md. 1978).

26. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on

doctrine targets a specific, previously litigated and resolved issue, but does not necessarily entirely bar a case.²⁷

There are exceptions to the collateral estoppel doctrine. In both civil and criminal cases, a party is not allowed to rely on the collateral estoppel doctrine if one of the following conditions exists: the party against whom it is invoked could not have obtained review of the judgment in the initial proceeding; that party did not have the opportunity or incentive to obtain full and fair adjudication of the issue in the initial proceeding; the law has changed; differences in the nature of the procedures followed or allocation of jurisdiction between the two courts warrants reconsideration; there is a relevant difference in the burden of persuasion; or other policy concerns weigh heavily in favor of reconsideration.²⁸

the same or a different claim.” RESTATEMENT (SECOND) OF THE LAW: JUDGMENTS § 27 (1982); *see also* 18 WRIGHT, *supra* note 2, §§ 4405-15 (2d ed. 2002) (discussing claim preclusion). *But see* Allan D. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 496-97 (1981) (advocating the application of preclusion to issues that could have been litigated even if they were not).

27. *See* 18 WRIGHT, *supra* note 2, § 4416 (2d ed. 2002) (generally discussing issue preclusion); Catlett et al., *supra* note 17, at 370-71 (generally discussing issue preclusion).

28. The RESTATEMENT (SECOND) OF THE LAW: JUDGMENTS § 28 provides:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Id. *But see* Buckley, *supra* note 23, at 898-900 (discussing the exception that applies for reasons of fairness and criticizing the Restatement).

One concern in applying collateral estoppel is mutuality. Courts traditionally would not permit a party to invoke collateral estoppel based on a favorable judgment unless the opposing party would likewise have been able to invoke collateral estoppel had it prevailed in the initial proceeding. Only in the 1970s did the Supreme Court relax the mutuality requirement in civil cases.²⁹ In *Ashe v. Swenson*, the Court applied collateral estoppel against the prosecution despite lack of mutuality, holding that the double jeopardy clause grants the defendant collateral estoppel protection even though the prosecution has no corresponding ability to enforce favorable determinations.³⁰ Ten years later, in *Standefer v. United States*, however, the Court took a strong stance against extending nonmutual collateral estoppel in criminal cases.³¹ In *Standefer*, the defendant sought to apply collateral estoppel to bar the prosecution from litigating in his trial an issue resolved favorably in a codefendant's trial. The Court rejected the defendant's argument and explained that in the civil cases where it had recognized nonmutual collateral estoppel, the doctrine "promoted judicial economy and conserved private resources without unfairness to the litigant against whom estoppel was invoked."³² The Court noted that criminal cases implicate different policy considerations. Specifically, criminal procedural rules limit the prosecution's ability to litigate vigorously and obtain appellate review of unfavorable determinations.³³ Further, the rules permit the jury to acquit against the evidence and provide the prosecution no recourse if the defendant is acquitted due to error or because the acquittal is against the weight of the evidence.³⁴ The Court also noted that the admissibility of evidence may vary from defendant to

29. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (moving away from the mutuality requirement); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349 (1971) (overruling the rigid mutuality requirements and stating that "[i]t is clear that judicial decisions have tended to depart from the rigid requirements of mutuality"). See also Vestal, *supra* note 18, at 285-86 (discussing *Blonder-Tongue* and *Parklane Hosiery*).

30. 397 U.S. 436 (1970).

31. 447 U.S. 10 (1980).

32. *Id.* at 21.

33. *Id.* at 22-24.

34. The Court explained:

First, in a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence; and it cannot secure appellate review where a defendant has been acquitted.

Id. at 22 (citations omitted).

defendant.³⁵ As a result, in *Standefer*, the Court would not apply nonmutual collateral estoppel against the prosecution.³⁶ Since then, however, courts have recognized that, at least as to issues other than the elements of the offense, mutuality can be achieved and have allowed both the prosecution and the defense to employ collateral estoppel on a range of issues.³⁷

Some courts have asserted that the prosecution can never use collateral estoppel offensively against a criminal defendant.³⁸ However, the issue is more nuanced than this blanket assertion would suggest. The use of collateral estoppel against the defendant must be justified by the policy considerations that customarily support the application of the doctrine.³⁹ Whether offensive collateral estoppel is allowed should depend on the issue targeted by the prosecution. Barring the defendant from litigating any aspect of the charged offense should not be allowed, but estopping the defendant from relitigating other issues may be appropriate. For example, the doctrine may be used to bar the defendant from relitigating issues such as the sufficiency of the indictment or the admissibility of evidence subject to a motion to suppress.⁴⁰

B. *Res Judicata*

The term *res judicata* is sometimes used to refer to both claim preclusion and issue preclusion, and sometimes to refer only to claim preclusion.⁴¹ *Res judicata* applies only after a final judgment.⁴² As a

35. *Id.* at 23-24.

36. *Id.* at 25-26.

37. *See generally* 18A WRIGHT, *supra* note 2, § 4463 (discussing the requirements of mutuality); *Commonwealth v. Gant*, 945 A.2d 228, 229, 231 (Pa. Super. Ct. 2008) (holding that the trial court erred when it gave preclusive effect to a federal court's ruling on the defendant's motion to suppress, citing the mutuality requirement for collateral estoppel); *see also* *Commonwealth v. Iverson*, 516 A.2d 738, 739 n.2 (Pa. Super. Ct. 1986) (approving procedure adopted in trial court treating Delaware court's denial of defendant's motion to suppress his statements as preclusive but allowing defendant to challenge Delaware ruling). *But see* *Vestal*, *supra* note 18, at 317 (suggesting that collateral estoppel arising from a prosecution brought by one governmental body should operate to constrain a defendant in a later prosecution brought by a different governmental entity).

38. *See, e.g.*, *Bies v. Bagley*, 519 F.3d 324, 339 (6th Cir. 2008), *rev'd sub nom.* *Bobby v. Bies*, 556 U.S. 825 (2009) (stating that the state cannot employ collateral estoppel against the defendant); *United States v. Delano*, 543 F. Supp. 2d 791, 808 (N.D. Ohio 2008) (amending past order and not applying collateral estoppel); *see also* *Jiron v. City of Lakewood*, 392 F.3d 410, 417 (10th Cir. 2004) (holding that guilty plea had collateral estoppel effect in civil case but stating that offensive use of collateral estoppel based on guilty plea is prohibited in criminal cases).

39. *See* *People v. Goss*, 503 N.W.2d 682, 684 (Mich. Ct. App. 1993).

40. *See infra* Section III.A.

41. 18 WRIGHT, *supra* note 2, § 4402, at 7-12 (2d ed. 2002) (discussing difference between collateral estoppel and *res judicata*).

principle applying only to claim preclusion, it plays no independent role as a prosecutorial tool in criminal cases. As an issue preclusion principle, *res judicata* functions in most respects like collateral estoppel, as discussed above.

The claim preclusion aspect of *res judicata* is subsumed in double jeopardy protection, which protects defendants from successive prosecutions for the same offense.⁴³ Provided that jeopardy attached in the first proceeding, a defendant can invoke double jeopardy to bar further prosecution for the same offense regardless of whether the first case ended in conviction or acquittal, and sometimes to bar further prosecution after a mistrial.⁴⁴ Unlike the defendant, however, the prosecution cannot invoke double jeopardy and will never be in the position of arguing that a defendant's claim, as distinct from a particular issue, is foreclosed.

As applied to issue preclusion, the term *res judicata* is sometimes used to suggest a somewhat broader rule of preclusion than collateral estoppel. Collateral estoppel is generally applied to bar only issues that were actually litigated. *Res judicata* generally refers to a rule extending to issues that could have been raised but were not actually litigated in the initial proceeding.⁴⁵ For example, in

42. See *id.* § 4405, at 82-83 (discussing *res judicata*); see also *State v. Presler*, 731 A.2d 699, 705-06 (R.I. 1999) (Flanders, J., concurring) (criticizing the majority's application of *res judicata* where the earlier decision led to remand, but not to final judgment, and arguing that the law of the case doctrine should have applied).

43. See 6 LAFAVE, *supra* note 9, § 25.1(f), at 1213 (discussing generally what constitutes the "same offense"); see also Comment, *The Use of Collateral Estoppel Against the Accused*, 69 COLUM. L. REV. 515 (1969) [hereinafter Comment, *Collateral Estoppel*].

44. See 5 LAFAVE, *supra* note 9, § 17.4(b), at 876-83 (discussing "same offense" under double jeopardy).

45. 18 WRIGHT, *supra* note 2, § 4402, at 7 (2d ed. 2002) (discussing the "effect of foreclosing any litigation of matters that never have been litigated"); *State v. Ramirez*, 921 A.2d 702, 712 (Conn. App. Ct. 2007) (recognizing that *res judicata* may reach issues that could have been raised but were not); *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (noting that *res judicata* bars litigation of claims that could have been decided in a previous action); *State v. Ketterer*, 935 N.E.2d 9, 21 (Ohio 2010) (noting that *res judicata* bars claims that "could have been raised at trial or on appeal"); *Meyers v. State*, 164 P.3d 544, 547 (Wyo. 2007) (quoting *Gould v. State*, 151 P.3d 261, 266 (Wyo. 2006)) (stating that "*res judicata* applies in criminal cases" and extends to issues that "could have been raised in an earlier proceeding"). *But see* *People v. Whitfield*, 840 N.E.2d 658, 663 (Ill. 2005) (noting that postconviction issues that "could have been raised on direct appeal, but were not, are procedurally" waived, and "issues . . . previously . . . decided by a reviewing court are barred by . . . *res judicata*"); *Timberlake v. State*, 753 N.E.2d 591, 597-98 (Ind. 2001) (stating that issues "known and available, but not raised on direct appeal, [are] waived," and *res judicata* bars only issues raised and decided adversely); *Brown v. State*, 798 So. 2d 481, 500-01 (Miss. 2001) (holding that the claims the defendant could have raised on appeal were procedurally waived, and claims that were already decided were barred by *res judicata*).

Meyers v. State, the court held that res judicata barred the defendant from challenging the voluntariness of his nolo plea because he had not raised the issue in his initial appeal.⁴⁶ Collateral estoppel would not have barred relitigation because the issue was not actually litigated and resolved against the defendant in the prior proceeding. Thus, when a court applies res judicata as distinct from collateral estoppel, its role is to expand the number of issues the prosecution can insulate from further litigation.⁴⁷

C. Law of the Case

The law of the case doctrine expresses a preference for not reconsidering or changing a ruling that was made earlier in the same case.⁴⁸ It is grounded in a concern for consistency.⁴⁹ The law of the

46. 164 P.3d at 547 (Wyo. 2007); *see also Gould*, 151 P.3d at 266 (holding that the defendant's failure to raise a merger issue in earlier litigation created a res judicata bar).

47. *See, e.g., Presler*, 731 A.2d at 704 (stating that res judicata precludes relitigation of issues that could have been raised but were not).

48. *See* 18B WRIGHT, *supra* note 2, § 4478, at 637-45 (discussing the law of the case doctrine generally); *see also* First Union Nat'l Bank v. Pictet Overseas Trust Corp., 477 F.3d 616, 620 (8th Cir. 2007) (“[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.”) (citation omitted); *United States v. Rivera-Martinez*, 931 F.2d 148, 150-51 (1st Cir. 1991) (explaining law of the case doctrine); *People v. Evans*, 727 N.E.2d 1232, 1235 (N.Y. 2000) (explaining law of the case doctrine). In *In re De Facto Condemnation and Taking of Lands of WBF Assoc., L.P. ex rel. Lehigh-Northampton Airport Authority*, 903 A.2d 1192, 1207-08 (Pa. 2006), the court explained the law of the case:

It is well established that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions on the same issue. This rule is premised on sound judicial policy, and departure from the rule is permitted only in exceptional circumstances, such as where there has been an intervening change in the controlling law, where there has been a substantial change in the facts or evidence giving rise to the dispute, or where the prior holding was clearly erroneous and would create manifest injustice if followed. In *Riccio v. American Republic Insurance Co.*, 550 Pa. 254, 705 A.2d 422, 425 (1997), this Court explained that the coordinate jurisdiction rule falls within the “law of the case” doctrine, which embodies the concept that:

[A] court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

(internal citations omitted).

49. 18B WRIGHT, *supra* note 2, § 4478, at 637-38 (“Law-of-the-case rules have

case doctrine has two aspects. One aspect—the mandate rule—prevents a lower court from relitigating an issue after a reviewing court has decided the issue in the same case.⁵⁰ The other aspect—sometimes referred to as the coordinate jurisdiction rule—provides that a court should not ordinarily reconsider issues already decided by a court of coordinate jurisdiction.⁵¹ This second aspect of the doctrine, which is the principal focus of this Article, plays an important role when a case is reassigned to a different judge and one party wants to retain the benefit of a favorable ruling in an earlier stage of the case. The doctrine regulates the court’s discretion but does not deprive a court of the power to revisit an issue. Thus, although a court can allow relitigation of its own rulings or those of a court of coordinate jurisdiction, the doctrine provides that the court ordinarily should not do so.⁵² However, if a court fails to follow the law of the case and issues a ruling that is inconsistent with the earlier ruling, that decision will be reviewed deferentially, because the doctrine merely circumscribes the exercise of discretion.⁵³

The law of the case doctrine is supported by a number of

developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.”).

50. See *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002) (discussing the mandate rule); *United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986) (applying the mandate rule); *Evans*, 727 N.E.2d at 1235 (explaining this aspect of the doctrine); *Commonwealth v. Romberger*, 378 A.2d 283, 284 (Pa. 1977) (applying the mandate rule without explicit mention of it or law of the case); see also *Presler*, 731 A.2d at 702 (referring to this effect as *res judicata* rather than the law of the case). When a reviewing court has acted, the lower court does not generally have the power to deviate from that decision. See generally 18B WRIGHT, *supra* note 2, § 4478.3 (discussing mandate rule).

51. See *Ellis*, 313 F.3d at 646 (noting that this aspect of the doctrine is more flexible, stating that it “frowns upon, but does not altogether prohibit, reconsideration of orders within a single proceeding by a successor judge”); see also *United States v. Agofsky*, 516 F.3d 280, 282-83 (5th Cir. 2008) (invoking the law of the case to preclude defendant from relitigating issue decided against him by a different panel of judges in an earlier appeal in the same case); *Commonwealth v. Starr*, 664 A.2d 1326, 1332 (Pa. 1995) (concluding that the coordinate jurisdiction rule is part of the law of the case doctrine). Not all jurisdictions recognize this aspect of the doctrine. See, e.g., *Dickerson v. Commonwealth*, 174 S.W.3d 451, 466-67 (Ky. 2005) (holding that the law of the case applies only to appellate rulings); see generally 18B WRIGHT, *supra* note 2, § 4478.4 (discussing the application of the doctrine to courts of coordinate jurisdiction).

52. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (“A court has the power to revisit prior decision of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances”); *Ellis*, 313 F.3d at 646 (recognizing that the doctrine does not bind successor judge); *Presler*, 731 A.2d at 703 (recognizing that the court has discretion to revisit the issue governed by the law of the case doctrine); see also 18B WRIGHT, *supra* note 2, § 4478.1, at 693 n.3 (stating that the doctrine is “a matter of discretion, not a limit on power”).

53. 18B WRIGHT, *supra* note 2, § 4478.1, at 695 (arguing that when an appellate court considers a law of the case argument, it must grant deference to the trial court).

policies.⁵⁴ The doctrine promotes consistency, efficiency, finality, and conservation of judicial resources.⁵⁵ If courts of concurrent jurisdiction freely rendered inconsistent rulings in successive phases of the same case or disregarded appellate rulings, the parties could not treat any issue as decided until it had been settled on appeal. The parties would be able to reopen and relitigate any unfavorable ruling related to an aspect of the case now before a different judge of concurrent jurisdiction, injecting delay and uncertainty, and consuming judicial resources.

The law of the case doctrine applies to a wide range of rulings. Unlike collateral estoppel and *res judicata*, the law of the case doctrine applies to rulings that are not embodied in a final judgment.⁵⁶ Because collateral estoppel already gives preclusive

54. See *Ellis*, 313 F.3d at 646-47 (summarizing policies). In *Ellis*, the court set out five policies:

For one thing, the law of the case doctrine affords litigants a high degree of certainty as to what claims are—and are not—still open for adjudication. For another thing, it furthers the abiding interest shared by both litigants and the public in finality and repose. Third, it promotes efficiency; a party should be allowed his day in court, but going beyond that point deprives others of their days in court, squanders judicial resources, and breeds undue delay. Fourth, the doctrine increases confidence in the adjudicatory process: reconsideration of previously litigated issues, absent strong justification, spawns inconsistency and threatens the reputation of the judicial system. Finally, judges who too liberally second-guess their co-equals effectively usurp the appellate function and embolden litigants to engage in judge-shopping and similar forms of arbitrage.

Id. at 647 (citations omitted); see also *In re De Facto Condemnation and Taking of Lands of WBF Assoc., L.P.*, 903 A.2d 1192, 1207-08 (Pa. 2006) (stating reason for the doctrine). In *WBF Associates*, the court explained:

The rule serves “not only to promote the goal of judicial economy” but also: “(1) to protect the settled expectations of the parties; (2) to ensure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end.” In ascertaining whether the law of the case doctrine applies, this Court looks to the timing of the rulings within the procedural posture of the case.

Id. at 1207-08 (citations omitted); see also Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 602-05 (1987) (discussing policies that support the law of the case doctrine).

55. *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 620 (8th Cir. 2007) (“The underlying intent of the doctrine is to ‘prevent[] the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency.’”); see also *Evans*, 727 N.E.2d at 1236 (agreeing that the law of the case doctrine eliminates disorder and inefficiency).

56. See 18B WRIGHT, *supra* note 2, § 4478, at 639-41 (“As rules that govern within a single action, they do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment.”); see also *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1097 (9th Cir. 1994) (“The . . . argument that the law of

effect to final judgments, applying the law of the case doctrine to nonfinal rulings as well as final rulings provides additional support for consistency and the other relevant policies. Thus, applying the doctrine to preliminary rulings gives it an effective and appropriate role.

Because the law of the case applies to nonfinal rulings, the doctrine tolerates further reconsideration of those rulings.⁵⁷ The law of the case doctrine has less force and is more flexible than other rules of consistency.⁵⁸ Since the doctrine is discretionary, a party may ask a court to revisit a question and advance a new basis for the relief sought. In contrast, if the question has been resolved by a final order, then *res judicata* or collateral estoppel may bar further consideration even if the party has new information. *State v. Presler* turned on this difference but raised a question about proper

the case doctrine does not apply to interlocutory orders which are not immediately appealable is meritless.”). *But see* *Murr Plumbing, Inc. v. Scherer Bros. Fin. Serv. Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995) (“[T]he doctrine of law of the case is applicable only to final judgments, not to interlocutory orders.”); *United States v. Bettenhausen*, 499 F.2d 1223, 1230 (10th Cir. 1974) (“The rule of the law of the case does not apply unless there is a final judgment that decided the issue.”); *Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 15 (5th Cir. 1986) (“The short and conclusive answer to this argument is that the district court’s initial order . . . was interlocutory, and the district court remained free to correct its order.”); *United States v. Phillips*, 59 F. Supp. 2d 1178, 1187 (D. Utah 1999) (noting disagreement and concluding that the Tenth Circuit applies the law of the case doctrine only after final judgment). Some orders are so clearly preliminary rulings made with the expectation they will be reviewed that they do not have law of the case effect. *See* 18B WRIGHT, *supra* note 2, § 4478.1, at 695-706 (discussing preliminary rulings); *United States v. Murray*, 771 F.2d 1324, 1327 (9th Cir. 1985) (holding that the trial court could properly review preliminary determination made by the duty judge before case was assigned).

57. *See* 18B WRIGHT, *supra* note 2, § 4478.1, at 695-706 (discussing the need for “the reconsideration of” preliminary rulings as the case proceeds).

58. *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987) (stating the law of the case does not have as strong an effect as *res judicata*); *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998) (stating that law of the case doctrine is more flexible than *res judicata*); *State v. Presler*, 731 A.2d 699, 703 (R.I. 1999) (discussing differences between the law of the case doctrine and *res judicata*). In *Hopkins v. State*, 769 N.E.2d 702, 705 n.2 (Ind. Ct. App. 2002), the court explained the difference between *res judicata* and the law of the case:

[I]n the past, the terms “law of the case doctrine” and “*res judicata*” had been used interchangeably. We also noted in *Williams* that they are two separate concepts: the law of the case doctrine is a discretionary doctrine which is implicated when a litigant asks a court to revisit an earlier decision of its own in a collateral appeal of that decision and expresses the practice of courts generally to refuse to reopen what has been decided. *Res judicata* provides that a judgment on the merits is an absolute bar to a subsequent action on the same claim between the same parties. Because *Hopkins* asks this court to revisit its earlier decision regarding the instruction issue, the law of the case doctrine is the appropriate doctrine to be applied in this case. (citation omitted).

application of the law of the case doctrine.⁵⁹ In *Presler*, the defendant had persuaded the trial court to suppress his blood samples, but the appellate court reversed the favorable ruling and remanded the case for further proceedings. The defendant again moved for suppression, adding the allegation that the blood was taken at the direction of the state police. The trial court found otherwise and denied the motion. The defendant was convicted and argued on appeal that the evidence should have been suppressed.⁶⁰ The majority concluded that the prior appellate resolution was a final judgment on the question of whether the blood samples were admissible. As a result, the court held that the defendant should have been precluded from pursuing a second motion to suppress, even though he advanced a new theory in support of that motion.⁶¹ Law of the case doctrine would have permitted reconsideration of the matter because the new allegations would bring new evidence into the case. In contrast, *res judicata* barred further litigation, not only of the fully litigated issues but also of the issues that could have been raised in the initial proceeding. The concurring justice applied law of the case appropriately. He argued that the matter had not been resolved by a final judgment and applied the law of the case doctrine against the defendant. He concluded that the court's earlier ruling had resolved the issue of whether the blood was taken at the request of the state and that no exceptional circumstances existed to warrant departure from the doctrine.⁶²

Nevertheless, failure to adhere to the law of the case may warrant reversal. *Ellis v. United States* illustrates application of the doctrine against a defendant.⁶³ In *Ellis*, the defendant was convicted in federal court. When he later petitioned for habeas relief, his case was assigned to the original trial judge. In his petition, the defendant alleged several grounds for relief, including the allegation that the trial judge was biased and had engaged in misconduct. On the basis of this allegation, the defendant sought recusal. The judge resolved several matters against the defendant, including a claim that the defendant's right to confrontation had been violated. He then recused himself as to the bias claim and asked that the case be reassigned so a different judge could address that issue. The judge to whom the bias claim was reassigned resolved the claim of bias against the defendant but then went on to reconsider the confrontation claim

59. 731 A.2d 699, 703 (R.I. 1999).

60. *Id.* at 701-03.

61. *Id.* at 704-07.

62. *Id.* at 705-08 (Flanders, J., concurring).

63. 313 F.3d 636 (1st Cir. 2002); *see also* *Commonwealth v. Santiago*, 822 A.2d 716, 727 (Pa. Super. Ct. 2003) (reversing for failure to follow the law of the case).

already rejected by the trial judge.⁶⁴ Having explored the issue, the reassignment judge concluded that the trial court had violated the defendant's right to confrontation by permitting the juvenile victim-witness to testify without facing the defendant. The government argued that resolution of the Confrontation Clause claim exceeded the court's authority.⁶⁵ The First Circuit agreed, holding that the successor judge lacked adequate justification for departing from the law of the case doctrine and that the reconsideration constituted an abuse of discretion.⁶⁶

In most instances, the law of the case doctrine limits reconsideration of an issue only if it was actually or implicitly addressed and resolved.⁶⁷ Some courts, however, suggest that the doctrine applies to issues that could have been raised but were not.⁶⁸ A better approach is to address issues that were not raised under waiver doctrines, focusing on whether the failure to raise the issue earlier now forecloses the defendant. The law of the case doctrine is more appropriately focused on issues that have already been

64. *Ellis*, 313 F.3d at 638-40.

65. *Id.* at 646.

66. *Id.* at 653.

67. 18B WRIGHT, *supra* note 2, § 4478, at 649-54 (stating that the doctrine reaches only matters actually decided, not those that could have been decided, but were not); *Klay v. All Defendants*, 389 F.3d 1191, 1197 (11th Cir. 2004) ("The doctrine does not bar consideration of issues that could have been raised in a prior appeal but were not; however, the doctrine does apply not only as to matters decided explicitly but also as to those decided by necessary implication.") (citation omitted) (internal quotation marks omitted); *Wilmer v. Bd. of Cnty. Comm'rs of Leavenworth Cnty.* 69 F.3d 406, 409 (10th Cir. 1995) ("[O]nly matters actually decided, explicitly or implicitly, become law of the case"); *United States v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006) ("[T]he district court in the instant matter was required to follow this court's decisions, but only as to issues actually addressed and explicitly or implicitly decided upon in the court's previous disposition.") (citation omitted).

68. *See, e.g., United States v. Gore*, 377 F. App'x 317, 318 (4th Cir. 2010) ("These issues were or could have been raised in the earlier proceedings [and] [w]e therefore find that the claims are barred by the law-of-the-case doctrine and that none of the exceptions to this doctrine apply."); *United States v. Longoria*, 229 F. App'x 408, 412 (7th Cir. 2007) (stating that the law of the case doctrine "bars the district court from addressing issues that could have been raised on appeal, but were not"); *United States v. Randolph*, 47 F. App'x 729, 730 (6th Cir. 2002) ("The law-of-the-case doctrine precludes a challenge to a decision made at a previous stage of the litigation which could have been raised in a prior appeal, but was not."); *United States v. Singleton*, 759 F.2d 176, 178 (D.C. Cir. 1985) ("The doctrine also precludes questions 'decided by necessary implication as well as those decided explicitly.'") (quoting *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974)), *cert. dismissed*, 419 U.S. 987 (1974); *McDonald's Corp. v. Hawkins*, 888 S.W.2d 649, 650 (Ark. 1994) ("An argument that could have been raised in the first appeal and is not made until a subsequent appeal is barred by the law of the case."); *Allen v. State*, 995 A.2d 1013, 1028 (Md. Ct. Spec. App. 2010) (explaining that, in Maryland, the law of the case extends to issues that could have been raised).

addressed and resolved earlier in the case.⁶⁹

The doctrine has several exceptions in both civil and criminal cases.⁷⁰ Reconsideration may be permitted in the following situations: first, the initial ruling was intended to be only tentative or was made before the record was complete; second, the controlling law has changed;⁷¹ third, the party can point to newly discovered evidence bearing on the question;⁷² and, fourth, reconsideration is necessary to “avoid manifest injustice.”⁷³ This is not to suggest that any weakness in the initial ruling or doubt about its correctness will undermine the doctrine.⁷⁴ Similarly, the court should not depart from the doctrine simply because the party advances a more persuasive

69. See generally 18B WRIGHT, *supra* note 2, § 4478 (discussing when the law of the case doctrine applies); *cf. Allen*, 995 A.2d at 1029 (mingling the two concepts in concluding that “under the law of the case doctrine [the defendant] has waived his right to raise” the issue of admissibility of particular evidence).

70. See *Ellis*, 313 F.3d at 647-48 (listing exceptions); 18B WRIGHT *supra* note 2, § 4478, at 670-91 (discussing exceptions).

71. See *Commonwealth v. Santiago*, 822 A.2d 716, 723-27 (Pa. Super. Ct. 2003) (discussing the exception for change of law).

72. See, e.g., *United States v. Sampson*, No. 4:07-CR-389-12, 2010 WL 2505774, at *3-4 (M.D. Pa. June 15, 2010) (addressing defendant’s second motion to suppress in same case, which had been assigned to a new judge after ruling on initial motion to suppress, and holding that, to fall within the exception for new evidence, the defendant must specifically identify the information not available at the time of the initial ruling); *Weedon v. State*, 750 A.2d 521, 527 (Del. 2000) (holding recantation of earlier testimony, which constituted “subsequent *factual* developments,” entitled defendant to reconsideration of marital privilege issue); *State v. Presler*, 731 A.2d 699, 703 (R.I. 1999) (recognizing exception). Because the mandate rule aspect of the doctrine applies only to questions of law, and not to questions of fact, the party seeking reconsideration may avoid the law of the case effect by presenting new evidence that changes the outcome. Furthermore, in *People v. Barragan*, 83 P.3d 480, 487-91 (Cal. 2004), the court held that the party seeking to avoid the impact of the doctrine (there, the prosecution) need not satisfy a due diligence requirement; that is, the party need not establish that the new evidence would not have been discovered before the earlier proceeding through the exercise of due diligence. *Id.* However, some courts will apply waiver principles to bar the party from raising issues that could have been raised in the earlier proceeding. See *McCullen v. Coakley*, 759 F. Supp. 2d 133, 140 (D. Mass. 2010) (denying the plaintiff’s argument that the court should apply the “significant new evidence” exception to the law of the case, because the plaintiff did not show that any new evidence was “not earlier obtainable in the exercise of due diligence”).

73. *Ellis*, 313 F.3d at 647-48 (listing exceptions). The court may consider the overall fairness of reconsidering the issue. In *United States v. Miller*, 822 F.2d 828, 832-33 (9th Cir. 1987), the government initially conceded on appeal that the legality of the initial search was conclusive of the legality of the later search. The court determined that the concession did not bind the court, not only because the concession was based on an erroneous interpretation of the law but also because the government had withdrawn the concession in the trial court, giving the defendant an opportunity to litigate the issue. *Id.* at 831; see also *Weedon*, 750 A.2d at 527-28 (noting that rule of criminal procedure codified law of the case and allowed reconsideration if necessary in the interests of justice).

74. *Ellis*, 313 F.3d at 647-49.

argument than initially proffered.⁷⁵ Indeed, some courts hold that the manifest injustice exception requires both a showing that the earlier ruling was unreasonable and a showing of prejudice.⁷⁶

Because the law of the case doctrine applies to nonfinal rulings, a party may argue that resolution of an issue in an earlier case that ended in dismissal or mistrial is the law of the case in a new action initiated by a new indictment or information. Application of the law of the case doctrine may depend on the ultimate resolution of the earlier proceeding. Some courts treat the first trial as entirely voided when the case proceeds to a new trial.⁷⁷ Others conclude that a decision becomes law of the case for all successive stages.⁷⁸ Given the court's flexibility to reconsider issues governed by the law of the case doctrine, earlier rulings should normally be treated as law of the case, controlling unless circumstances warrant reconsideration.⁷⁹

However, when the prosecution invokes law of the case based on a ruling in a proceeding that did not culminate in a final judgment, the court should ensure that the defendant's right to appeal is not compromised. If the court ruled against the defendant, but the case never proceeded to final judgment, the defendant will not have had

75. The court in *Ellis* states:

[A] belief that the litigant may be able to make a more convincing argument the second time around will suffice to justify reconsideration. For this purpose, there is a meaningful difference between an arguably erroneous ruling (which does not justify revisitation by a co-equal successor judge) and an unreasonable ruling that paves the way for a manifestly unjust result.

Id. at 648 (citations omitted).

76. See, e.g., *id.* at 648 n.5 ("A finding of manifest injustice also requires a finding of prejudice."); see also *United States v. Hollis*, 506 F.3d 415, 421-22 (5th Cir. 2007) (vacating conviction at government request and recognizing that law of the case should not preclude action where earlier panel decision was clearly wrong and would allow illegal conviction to stand); *Miller*, 822 F.2d at 833 (holding that the law of the case did not bind the court where the government's concession was wrong on the law and would result in "substantial injustice" by leading to suppression of admissible evidence).

77. See, e.g., *United States v. Akers*, 702 F.2d 1145, 1148 (D.C. Cir. 1983) (concluding that the law of the case doctrine played no role because the grant of the new trial rendered the first trial a nullity); *United States v. Phillips*, 59 F. Supp. 2d 1178, 1184-88 (D. Utah 1999) (holding that the law of the case does not apply to a new case after the original was discussed); see also 18B WRIGHT, *supra* note 2, § 4478, at 638-39 (the doctrine does not apply between separate actions).

78. See, e.g., *United States v. Hoffecker*, 530 F.3d 137, 163-65 (3d Cir. 2008) (rejecting the argument that a defendant must renew and relitigate all issues before new trial granted after mistrial); *United States v. Sanders*, 485 F.3d 654, 657 (D.C. Cir. 2007) (concluding that the law of the case is applied in second trial); *United States v. Todd*, 920 F.2d 399, 404 (6th Cir. 1990) (stating that the law of the case applies to retrial after mistrial).

79. Rulings favorable to the defendant should be treated as law of the case, otherwise the government could dismiss and refile to effectively void an unfavorable pretrial ruling.

an opportunity to challenge the adverse ruling on appeal.⁸⁰ Application of law of the case should not deprive the defendant of appellate review. The court can protect the defendant's access to review either by reconsidering the issue de novo or by fully incorporating the earlier record, including the ruling, into the second proceeding, thereby making it an appealable issue at the conclusion of the second trial.

D. *Stare Decisis*

Stare decisis doctrine reflects the judiciary's practice of adhering to established legal precedents unless special justification compels reconsideration of earlier decisions or traditional statutory interpretations.⁸¹ The concept of stare decisis is useful to achieve consistency in the law, implementing the preference for declining to alter judicially defined law governing an issue.⁸² However, stare decisis is not a helpful concept to explain whether a particular criminal defendant will be bound by the earlier resolution of a legal issue in the defendant's case or a factually related case.⁸³

Stare decisis is generally viewed as barring an appellate court from overruling or disregarding its prior precedent without adequate justification and binding a lower court to apply the governing precedent of the higher court.⁸⁴ Thus, stare decisis requires a court to

80. See 20 AM. JUR. 2D *Courts* § 130, at 510-11 (2005).

81. See *id.* § 131, at 511-13.

82. See generally Daniel A. Farber, Essay, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006) (discussing stare decisis); see also Goutam U. Jois, *Stare Decisis Is Cognitive Error*, 75 BROOK. L. REV. 63, 70-73 (2009) (giving arguments in favor of stare decisis).

83. In *Bethesda Lutheran Homes and Services, Inc. v. Born*, 238 F.3d 853, 858-59 (7th Cir. 2001), the court explained the relationship between issue preclusion and stare decisis:

It is res judicata that bars the same party from relitigating a case after final judgment, and the doctrine of law of the case that counsels adherence to earlier rulings in the same case. It is stare decisis that bars a different party from obtaining the overruling of a decision. The existence of different parties is assumed by the doctrine, rather than being something that takes a case outside its reach. Of course, stare decisis is a less rigid doctrine than res judicata. But it is not a noodle. For the sake of law's stability, a court will not reexamine a recent decision (our previous decisions are two and three years old, respectively) unless given a compelling reason to do so. The reason might be a legislative change, a change in applicable regulations, a judicial decision dealing with a related or analogous issue, a change in the social or economic context of the issue, or some other important new information.

(citations omitted); see also *United States v. Connor*, 926 F.2d 81, 83 (1st Cir. 1991) (noting that stare decisis "has its roots not in safeguarding the finality of judgments but in principles of stability and equality of treatment").

84. See 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.01 (3d ed. 1997) ("[Stare decisis] compels lower courts to follow the decisions of higher courts on questions of law. The United States Supreme Court, however, has the power to depart

apply the legal principles already determined by certain other courts. However, the doctrine does not preclude a party from litigating the facts of the party's own case or foreclose the argument that the earlier precedent does not govern the facts of the later case. Further, it leaves the parties free to attempt to persuade the court to alter or abandon its earlier holding.⁸⁵ The doctrine nevertheless has been applied to bar a defendant from relitigating an issue.⁸⁶

The doctrine adds nothing to other preclusion doctrines when the defendant was involved in the earlier litigation.⁸⁷ Often, the crux of the issue in a criminal case is whether the defendant can revisit or supplement the facts, a question to which *stare decisis* does not speak. If the defendant already litigated the same issue in the same case, the government will want to bar relitigation. The doctrines of collateral estoppel and law of the case adequately limit the defendant's ability to relitigate, making an appeal to *stare decisis* unnecessary.⁸⁸

In some cases, the trial court ascribes too much force to the *stare decisis* effect of an earlier determination.⁸⁹ In *United States v. Willoughby*, for example, the trial court erroneously concluded that the appellate determinations addressing sufficiency of the evidence

from its own prior decisions."). Thus, all federal courts must apply the holdings of the Supreme Court, and the Court itself should overrule its prior decisions only cautiously. However, a circuit court is not obligated to apply the decisions of a different circuit, and a federal district court must follow the precedent of the circuit court for its geographic district but need not adhere to precedent from other circuits. *See* *Nw. Forest Res. Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) (holding that the decision of a federal district court in one circuit did not have *stare decisis* effect in a case before a federal court in another); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123-24 (7th Cir. 1987) (holding that the decision of a federal district court in Michigan did not have *stare decisis* effect in a case before a federal court in Illinois).

85. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1067-74 (2003) (questioning flexibility of *stare decisis*).

86. *See, e.g.*, *United States v. Willoughby*, 27 F.3d 263, 267-68 (7th Cir. 1994). *Stare decisis* has also been used against the prosecution. In *United States v. Diaz-Bastardo*, 929 F.2d 798, 799 (1st Cir. 1991), the First Circuit cited *stare decisis* to support its rejection of the prosecution's argument to obtain an upward departure in sentencing on grounds that the court had rejected it in the prosecution of a different defendant arising from the same underlying facts. The court explained that "especially in a criminal case, accepted principles of *stare decisis* militate strongly in favor of resolving identical points in the same way for identically situated defendants." *Id.* (emphasis in original); *see also Connor*, 926 F.2d at 83 (applying *stare decisis* against the government on a speedy trial issue where a codefendant had successfully litigated the issue of the same delay).

87. *See* Minzner, *supra* note 1, at 606-12 (discussing difference between *stare decisis* and issue preclusion).

88. A court that is reluctant to estop the defendant may be willing to apply *stare decisis* to give effect to the earlier ruling. *But see* Barrett, *supra* note 85, at 1074-75 (questioning the role of *stare decisis*).

89. *See infra* Section IV.

in other cases forced a finding of guilt in a bench trial.⁹⁰ To the contrary, the finder of fact always has the latitude to determine the inferences established beyond a reasonable doubt by the evidence presented and cannot be required to find the defendant guilty.⁹¹

III. APPLYING CONSISTENCY-PROMOTING DOCTRINES AGAINST THE DEFENDANT

When the prosecution has received a favorable ruling in a related case or in an earlier stage of a prosecution, the prosecution has a strong incentive to bar relitigation and a possible inconsistent resolution of the issue. These four doctrines provide an arsenal for fighting relitigation. Each of the four is sometimes invoked by the prosecution to bar the defendant from pursuing litigation to obtain a more favorable result.

This Section of the Article considers the application of these doctrines against the defendant, examining issues that arise at different stages of the prosecution. Subsection A considers the offensive use of these doctrines to foreclose further litigation of a motion to suppress. Subsection B examines the application of the doctrines to evidentiary rulings. Subsection C discusses other preliminary, nonevidentiary motions. Subsection D evaluates offensive use of the doctrines to preclude the defendant from litigating issues related to guilt or innocence.

Some courts that address the applications of these doctrines assume that the court must consider whether the defendant received effective assistance of counsel at the earlier proceeding before giving preclusive effect to an earlier ruling against the defendant.⁹² However, there is little reason to assume that the court must undertake an independent evaluation of counsel's adequacy. First, the burden to raise and establish ineffective assistance of counsel ordinarily falls on the defendant.⁹³ Second, even if counsel is shown to have provided ineffective assistance, the court may determine that the particular issue on which preclusion is sought was unaffected. For example, in *Mancusi v. Stubbs*, even though defense counsel had been found to have provided ineffective assistance, the prosecution was still able to introduce testimony from the earlier trial against the defendant on the basis that the witness was unavailable and the cross-examination had been adequate.⁹⁴ The Court held that

90. 27 F.3d at 267-68.

91. *Id.*

92. *See, e.g.*, *United States v. Harnage*, 976 F.2d 633, 636 (11th Cir. 1992); *United States v. Martin*, 169 F. Supp. 2d 558, 563 n.6 (E.D. La. 2001).

93. *See generally* 3 LAFAYE, *supra* note 9, § 11.7(e), at 826-37 (discussing ineffective assistance of counsel claims).

94. 408 U.S. 204, 214-16 (1972).

counsel's ineffectiveness did not necessarily mean that the cross-examination was constitutionally deficient.⁹⁵ It was enough that the court of appeals had assessed the adequacy of the cross-examination and found it sufficient.⁹⁶ Thus, it does not appear that an inquiry into the effectiveness of counsel must be part of every offensive application of these doctrines.

A. *Motions to Suppress*

Prosecution use of consistency-promoting doctrines has been most successful in barring relitigation of motions to suppress. Unsurprisingly, having once convinced a court that evidence is constitutionally admissible, the prosecution does not want to relitigate the issue.⁹⁷ Often, courts either apply collateral estoppel, ruling that the defendant cannot further litigate a motion to suppress, at least in the absence of "new evidence or extraordinary circumstances,"⁹⁸ or apply the law of the case doctrine, giving effect

95. *Id.*

96. *Id.*

97. Vestal, *supra* note 18, at 318-321 (noting application of issue preclusion to suppression issues).

98. Laaman v. United States, 973 F.2d 107, 113 (2d Cir. 1992); *see* Steele v. United States, 267 U.S. 505, 507 (1925) (stating that an earlier proceeding determined that a search was valid and that an issue that defendant failed to raise in earlier case was res judicata); United States v. Rosenberger, 872 F.2d 240, 241-42 (8th Cir. 1989) (holding that the ruling against defendant on motion to return illegally seized property barred a later motion to suppress the same evidence); Pate v. Secretary, No. 6:08-cv-1848-Orl-31GJK, 2010 WL 2431867, slip op. at *4-6 (M.D. Fla. June 15, 2010) (rejecting a defendant's claim that a state court's application of collateral estoppel to preclude relitigation of suppression motion violated the Constitution); Order Regarding Magistrate's Amended Report and Recommendation Concerning Defendants Motion to Suppress, No. CR10-4024-MWB, 2010 WL 4103530, slip op. at *8 (N.D. Iowa Oct. 18, 2010) (holding that collateral estoppel was properly applied to bar a defendant from relitigating a motion to suppress); United States v. Cutolo, 861 F. Supp. 1142, 1150 (E.D.N.Y. 1994) (declining to reconsider a motion to suppress resolved by different court); State v. Ramirez, 921 A.2d 702, 711-12 (Conn. App. Ct. 2007) (applying collateral estoppel against a defendant on suppression issue); Miller v. State, 545 So. 2d 343, 344 (Fla. Dist. Ct. App. 1989) (recognizing that collateral estoppel would bar relitigation of a motion to suppress identification, regardless of which party prevailed in initial hearing); People v. Page, 614 N.E.2d 1160, 1167 (Ill. 1993) (concluding that offensive collateral estoppel applied in case and precluded a defendant from relitigating suppression issue); People v. Ramey, 604 N.E.2d 275, 280-81 (Ill. 1992) (holding that the trial court properly applied collateral estoppel to bar a defendant from relitigating a motion to suppress); State v. Hider, 715 A.2d 942, 945-46 (Me. 1998) (applying collateral estoppel to preclude a defendant from relitigating motion to suppress); State v. Moulton, 481 A.2d 155, 161-62 (Me. 1984) (stating, in dictum, that offensive collateral estoppel would bar a defendant from further litigation of suppression issues); Commonwealth v. Cabrera, 874 N.E.2d 654, 659 (Mass. 2007) (holding defendant was collaterally estopped by previous denial of motion to suppress); People v. Brown, 755 N.W.2d 664, 674-76 (Mich. Ct. App. 2008) (applying collateral estoppel to bar a defendant from further challenging search warrants already held

to the earlier ruling.⁹⁹ Nevertheless, consistency-promoting doctrines are not always applied.¹⁰⁰ Some courts are simply reluctant to give preclusive effect to an earlier ruling on a suppression motion.¹⁰¹ In

valid in prior case); *see also* Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1386 (1994) (noting offensive use of collateral estoppel against the accused on motions to suppress). In *United States v. McNair*, 439 F. Supp. 103, 107 (E.D. Pa. 1977), Judge Ditter offered to sit at the hearing with the judge presiding over the defendant's subsequent case to "hear the evidence, make [his] own findings of fact, draw [his] own conclusions of law, and rule on the motion [to suppress]." When that offer was rejected and the other judge denied the defendant's motion to suppress, Judge Ditter applied collateral estoppel and denied the motion without further hearings. *Id.* at 108.

99. *See* *United States v. Wheeler*, 256 F.2d 745, 746-48 (3d Cir. 1958) (applying law of the case reasoning to hold that the second judge should not have issued different ruling from the judge who initially denied motions to suppress and to dismiss); *Commonwealth v. Ringuette*, 819 N.E.2d 941, 942-43 (Mass. 2004) (holding that the prior ruling denying motion to suppress had become the law of the case when the two sets of charges were joined for trial); *Commonwealth v. Santiago*, 822 A.2d 716, 723-27 (Pa. Super. Ct. 2003) (applying the law of the case to bar defendant from relitigating motion to suppress); *cf.* *United States v. Stelten*, 867 F.2d 446, 450-51 (8th Cir. 1989) (stating that Tenth Circuit ruling suppressing evidence was binding even if the Eighth Circuit disagreed with it, a conclusion that appeared to rest on law of the case reasoning). *See also* 6 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11.2(f), at 91-98 (4th ed. 2010) (noting that rulings on motions to suppress operate as the law of the case but that the doctrine is flexible enough to allow reconsideration).

100. *See* *United States v. Price*, 13 F.3d 711, 720 (3d Cir. 1994) (acknowledging that application of collateral estoppel to successive motions to suppress was an open question); *Cabrera v. Clarke*, No. 08-10531-RWZ, 2010 WL 1529474, at *3 (D. Mass. Apr. 14, 2010) (noting a division of authority and a lack of Supreme Court guidance on whether denial of a motion to suppress in one case collaterally estops defendant from moving to suppress same evidence in later case); *see also* *United States v. Delano*, 543 F. Supp. 2d 791 (N.D. Ohio 2008). In *Delano*, the defendant moved to suppress evidence found in a traffic stop, arguing that the stop violated the Fourth Amendment. The defendant had been found guilty of traffic violations that would have justified the stop, so the prosecution argued that the defendant was collaterally estopped from arguing that the officer lacked the probable cause for the stop. *Id.* at 798. The court initially applied collateral estoppel against the defendant. However, the Sixth Circuit issued an opinion stating in dictum that collateral estoppel cannot be applied against the defendant in a criminal case. *Bies v. Bagley*, 519 F.3d 324, 342 (6th Cir. 2008), *rev'd on other grounds*, *Bobby v. Bies*, 556 U.S. 825 (2009). The *Bies* decision prompted the district court in *Delano* to reconsider and decline to give the guilty verdicts in the traffic cases preclusive effect. *Compare* *United States v. Rosenberger*, 872 F.2d 240 (8th Cir. 1989) (holding that the denial of defendant's motion for return of property pursuant to *Federal Rule of Criminal Procedure* 41(e) collaterally estopped the defendant from moving to suppress the evidence on the same ground), *and* *United States v. Yung*, 786 F. Supp. 1561 (D. Kan. 1992) (applying collateral estoppel on the basis of a preindictment motion to suppress and to return evidence), *with* *United States v. Hoskins*, 639 F. Supp. 512, 515 (W.D.N.Y. 1986) (declining to bar further litigation because the defendant's incentive in Rule 41 hearing was not sufficiently the same; the court talks about the compromise made in the Rule 41 hearing of providing defendant with copies of seized documents).

101. *See, e.g.*, *United States v. Campbell*, No. 07-10142-01-JTM, 2009 WL 361155

other instances, courts identify specific reasons for refusing to apply collateral estoppel.¹⁰²

Several policy arguments support the offensive use of collateral estoppel or law of the case to deny relitigation of a motion to suppress. These include protection of resources, promotion of consistency in rulings, and prevention of repetitive litigation.¹⁰³ However, the application of the doctrines against a criminal defendant should be tempered when certain special concerns arise in a criminal case.¹⁰⁴ To help guide the application of collateral estoppel in these cases, the United States District Court for the District of Massachusetts, in *United States v. Levasseur*, crafted a five-factor test, adapting civil criteria for issue preclusion to the criminal context.¹⁰⁵ There are five factors that should guide the application of the doctrine: 1) whether the issues in the two proceedings are identical; 2) whether the defense had a sufficiently similar incentive to have vigorously and thoroughly litigated the issue in the prior proceeding;¹⁰⁶ 3) whether the defendant was “a party to the previous litigation;” 4) whether the applicable law was the same; and 5) whether the first proceeding “resulted in a final judgment on the merits” that defendant had both opportunity and incentive to

(D. Kan. Feb. 13, 2009) (recognizing division of authority concerning collateral estoppel and therefore simply incorporating first court’s analysis by reference and denying the defendant’s motion on the same grounds).

102. See, e.g., *People v. Plevy*, 417 N.E.2d 518, 521-22 (N.Y. 1980) (declining to estop defendant from disputing his consent to the challenged search because defendant’s incentive to support his motion to suppress by testifying was sufficiently different in the second case that collateral estoppel should not operate).

103. See, e.g., *Page*, 614 N.E.2d at 1167-68 (mentioning “conservation of judicial resources and the avoidance of repetitive litigation”); see also *United States v. Thoresen*, 428 F.2d 654, 667 (9th Cir. 1970) (noting that relaxing the bar against defendant’s relitigation would lead to consistency between the results for the two defendants).

104. See, e.g., *Plevy*, 417 N.E.2d at 521-22 (noting that the doctrine of collateral estoppel “is less relevant in criminal cases where the pre-eminent concern is to reach a correct result and where other considerations peculiar to criminal prosecutions may outweigh the need to avoid repetitive litigation”); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1170 (5th Cir. 1981) (discussing the application of offensive collateral estoppel and noting that “considerations of fairness are of great importance”); *Page*, 614 N.E.2d at 1167 (“[S]pecial concerns may limit [collateral estoppel’s] use by the prosecution in criminal proceedings.”); *Cook v. State*, 921 So. 2d 631, 636 (Fla. Dist. Ct. App. 2005) (“Although the doctrine of collateral estoppel has been applied in criminal cases, application of the doctrine in the criminal context raises special concerns.”); see also *Commonwealth v. Lagana*, 509 A.2d 863, 866 (Pa. 1986) (discussing special concerns in criminal cases while evaluating the use of collateral estoppel against the prosecution).

105. 699 F. Supp. 965, 981 (D. Mass. 1988), *rev’d on other grounds*, *United States v. Levasseur*, 846 F.2d 786, 795 (1st Cir. 1988).

106. *Levasseur*, 699 F. Supp. at 981; see *Plevy*, 417 N.E.2d at 521-22 (raising concern with similarity of incentive).

appeal.¹⁰⁷ Applying these factors in *Levasseur*, the district court enforced collateral estoppel against six of the seven defendants.¹⁰⁸ Courts have since turned to these factors to assess the propriety of offensive use of collateral estoppel.¹⁰⁹

However, courts should add two other considerations to this list of factors. First, the defendant should be afforded the opportunity to argue that new evidence requires reconsideration. Second, courts should ensure that no other special concerns render preclusion unfair. If these requirements, as well as the *Levasseur* factors, are satisfied, a ruling on a motion to suppress should ordinarily be given preclusive effect. This approach effectively protects the defendant's rights, upholds the fairness of the process, and serves the policy goals of fostering consistency and conserving judicial and public resources.

United States v. Martin illustrates the recurring context in which the estoppel effect of resolution of a motion to suppress arises.¹¹⁰ In *Martin*, the government had conducted electronic surveillance during the investigation that led to the defendant's two indictments. Martin was tried first in the Middle District of Louisiana. In that trial, the court denied his motion to suppress the evidence obtained through the surveillance. When he later faced trial on different charges in the Eastern District, Martin again moved to suppress the fruits of the surveillance. The prosecution asked the trial court to apply collateral estoppel, giving preclusive effect to the Middle District ruling. The court acknowledged that in a comparable civil case, issue preclusion would bar reconsideration of the motion. But the court was convinced that the defendant's interest in suppressing illegally seized evidence outweighed any interest to be served by applying collateral estoppel.¹¹¹ As a result, the court concluded that collateral estoppel should not apply to the issue and evaluated the motion to suppress independently, denying it on the merits.¹¹² This process not only consumed additional resources but also threatened to generate a ruling inconsistent with the earlier ruling. All the factors listed above were satisfied, thus the court should simply have given preclusive effect to the ruling in the first trial.

Levasseur's emphasis on the defendant's access to appellate

107. *Levasseur*, 699 F. Supp. at 981.

108. *Id.* at 981-82.

109. *See, e.g.*, *United States v. Fernandez-Santos*, Criminal No. 10-0073 (JAG), 2011 WL 92079, at *3 (D.P.R. Jan. 10, 2011) (applying *Levasseur* test and holding that defendant was collaterally estopped from further litigating the suppression issue); *Commonwealth v. DeJesus*, Nos. 104104, 104107, 104110, 104105, 104108, 104117, 104106, 104109, 104118, 1998 WL 181658 (Mass. Super. Ct. Apr. 14, 1998).

110. 169 F. Supp. 2d 558 (E.D. La. 2001).

111. *Id.* at 563.

112. *Id.* The question of collateral estoppel was not raised on appeal.

review is critical to the fairness of offensive issue preclusion. It is unfair to apply collateral estoppel when the defendant has not received appellate review of the denial of the motion to suppress.¹¹³ For example, in *United States v. Fernández-Santos*, the defendant's motion to suppress was denied. The government then dismissed the initial indictment when its confidential informant died.¹¹⁴ The dismissal effectively deprived the defendant of the opportunity to obtain appellate review of the suppression ruling in that case.¹¹⁵ Nevertheless, in the successive proceeding the district court estopped the defendant, stating it was applying the test from *Levasseur*.¹¹⁶ But the combination of the dismissal of the first case and the estoppel in the second foreclosed the defendant's access to appellate review of the suppression issue. At the very least, the court should have held that the defendant was entitled to have the suppression ruling from the first trial reviewed if convicted in the second trial.

Some courts have recognized the importance of ensuring the fairness of estoppel sought by the prosecution.¹¹⁷ In *Commonwealth v. DeJesus*, the court stated that the five *Levasseur* requirements were met, but it also applied a fairness inquiry. The court concluded that collateral estoppel should not apply because the second set of charges (armed robbery and conspiracy) was significantly more serious than the initial charge (possession of a handgun).¹¹⁸ Instead,

113. See, e.g., *Commonwealth v. Ringuette*, 819 N.E.2d 941, 942-43 (Mass. 2004) (holding defendant was not collaterally estopped where the ruling resolving motion against defendant was not a final judgment, and, therefore, not subject to appeal as a matter of right); see also *United States v. Thoresen*, 428 F.2d 654, 667 (9th Cir. 1970) (holding that husband-defendant was not entitled to relitigate the suppression issue that had been resolved against him in an earlier trial, even though the defendant had not appealed the ruling because the charges were dismissed, but implementing a relaxed procedure that permitted relitigation); *Cook v. State*, 381 A.2d 671, 674 (Md. 1978) (declining to give collateral estoppel effect to the defendant's favorable ruling on a motion to suppress where the prosecution had no avenue to appellate review).

114. *United States v. Fernandez-Santos*, Criminal No. 10-073 (JAG), 2011 WL 92076, at *3 (D. P.R. Jan. 11, 2011).

115. The district court stated that the defendant did not appeal the denial of the motion. *United States v. Fernandez-Santos*, Criminal No. 10-0073 (JAG), 2011 WL 92079, at *3 (D. P.R. Jan. 10, 2011) However, the law is clear that the defendant does not have the right to an interlocutory appeal but can obtain appellate review of the suppression issue only after conviction. See *Di Bella v. United States*, 369 U.S. 121, 131-33 (1962) (stating that defendant could not appeal the district court's decision because a motion to suppress is an interlocutory decision within an overall criminal prosecution).

116. *Fernandez-Santos*, 2011 WL 92079, at *4.

117. See *Commonwealth v. DeJesus*, Nos. 104104, 104107, 104110, 104105, 104108, 104117, 104106, 104109, 104118, 1998 WL 181658, at *4 (Mass. Super. Ct. Apr. 14, 1998) (concluding that the *Levasseur* factors were met but nevertheless holding it would not be fair to estop the defendants from relitigating their motion to suppress).

118. See *id.* at *3-4.

the court should have concluded that the case failed to satisfy the *Levasseur* requirement of a sufficiently similar incentive to litigate. Although in *DeJesus*, the court did not need to rest its holding on a separate fairness inquiry, courts which are asked to apply offensive issue preclusion should always ensure that the process would be fair to the defendant.

A court may also ensure fairness by adopting a protective procedure to temper the effect of the issue preclusion.¹¹⁹ For example, in *Commonwealth v. Lagana*, the court prescribed such a procedure where the defendant invoked collateral estoppel to preclude relitigation of a suppression motion.¹²⁰ In *Lagana*, the defendant was charged separately with two offenses, but the evidence in each case was derived from a single seizure of the defendant. In the first case, where the defendant was charged with burglary, the trial court found a Fourth Amendment violation and granted the defendant's motion to suppress.¹²¹ The prosecution did not appeal but instead dismissed the burglary charges. In the related second case, the defendant persuaded the trial court to give the ruling in the first case preclusive effect.¹²² The Pennsylvania Supreme Court recognized the benefit of avoiding inconsistent rulings on the same issue but concluded that this benefit was not enough to overcome the "potential negative impact of perpetuating an erroneous ruling."¹²³ The court therefore

119. *See, e.g.*, *United States v. Thoresen*, 428 F.2d 654, 666-68 (9th Cir. 1970) (concluding, although the court took the position that the husband-defendant was barred from relitigating suppression issue, that the husband would be permitted to participate in the hearing afforded his codefendant-wife and to challenge any adverse ruling on appeal); *see also* *Commonwealth v. Ringuette*, 819 N.E.2d 941, 942-43 (Mass. 2004) (suggesting that even though collateral estoppel did not make a prior ruling effective against the defendant in second trial, a second court might have properly adopted the findings and rulings of the first trial court, giving the defendant access to appellate review of the suppression issue in the second trial).

120. 509 A.2d 863, 866 (Pa. 1986).

121. *Id.* at 864.

122. *Id.* at 865-67.

123. *Id.* at 866. In *Lagana*, the court explained:

Firstly, the expressed concern of risking a trial tainted by illegally seized evidence, merely because that evidence could be twice contested, seems frivolous at best. An assessment of the legality of the seizure of evidence is the very purpose of a suppression hearing. The mere fact that a defendant could be required to twice prove his assertion does not necessarily cast doubt upon the second determination if a record supports that decision. The decision is an independent judgment which must stand or fall on its own merit.

Secondly, the contention that a defendant may be subject to harassment by the Commonwealth also is baseless; for it ascribes to the Commonwealth a vindictiveness that is not borne out by this record.

.....

Finally, concerning the Superior Court's "fairness" consideration, we question whether "fairness to the defendant" is such a laudatory policy goal

tempered the application of collateral estoppel through a protective procedure. The court held that the findings and conclusions from the first hearing would become part of the record in the second court; the second court could consider new evidence not previously available to the prosecution; and the prosecution could appeal the adverse ruling even where the ruling rested entirely on the proceeding in the first court.¹²⁴ The appellate court could then determine the propriety of the initial ruling, if it was allowed to stand, or the new ruling.¹²⁵

One could argue that this modified procedure accorded the prosecution too much latitude to relitigate: the prosecution could have appealed the ruling in the initial case and should not use the dismissal of the first charges as a means to avoid the full effect of the first court's ruling. However, when applied to offensive use of collateral estoppel, the procedure provides a good balance between protecting the defendant's rights and conserving judicial resources and achieving consistency. In *Commonweath v. Camperson*, the court approved the application of this procedure to the offensive use of collateral estoppel.¹²⁶ The prosecution sought the benefit of a denial of the motion to suppress by a court of equal jurisdiction in a different county. The second trial court incorporated the earlier record and ruling into the new trial since the defendant offered no new evidence. The Superior Court approved the procedure and, after considering the defendant's arguments on the merits, affirmed the denial of the motion to suppress.¹²⁷ This approach gives effect to the earlier ruling yet ensures the defendant's opportunity to use any new evidence that has come to light and the defendant's access to appellate review.

The impact of the initial ruling may be greater if it has already been reviewed by an appellate court. In both *Lagana* and *Camperson*, the initial ruling had not been appealed. Ordinarily, if an appellate

when it is gained at the expense of perpetuating an erroneous ruling, thereby unfairly terminating a legitimate prosecution.

. . . . One of the most important [policy considerations favoring the application of collateral estoppel to suppression hearings] is the sound policy of avoiding having judges of equal jurisdiction, sitting on the same bench, overruling each other on the same record.

In the present context we believe that some limited form of collateral estoppel is dictated, since it would have the beneficial effect of discouraging the relitigation of the same issues based on the same evidence, while at the same time preventing judges of equal jurisdiction from entering diverse rulings on the same evidence. However, these benefits do not offset the potential negative impact of perpetuating an erroneous ruling.

Id. at 865-66.

124. *See id.* at 866.

125. *See id.*

126. 650 A.2d 65, 68-69 (Pa. Super. Ct. 1994).

127. *Id.* at 69-70.

court reverses the defendant's conviction on the ground that the prosecution introduced evidence obtained through an illegal search or seizure, the parties are not foreclosed on retrial from advancing new information bearing on the propriety of the seizure.¹²⁸ However, considering nonoffensive use of collateral estoppel, in *United States v. Monsisvais*, the Tenth Circuit concluded that when an appellate court determines that the prosecution's evidence was illegally seized, the trial court should not then reopen the evidence and permit the prosecution to overcome that determination.¹²⁹ The court reasoned that the determination of the question of law forecloses further factual presentation.¹³⁰ The rule espoused in *Monsisvais* is too strict and should not be applied to offensive use of collateral estoppel.¹³¹ Instead, the court should treat the suppression determination as law of the case. Although the trial court cannot disregard the appellate ruling, the court has discretion to reopen the hearing and should do so if either party has new evidence.

Interestingly, most decisions address the issue as one of collateral estoppel and do not evaluate the law of the case implications. The appropriate balance may better be achieved by applying the law of the case doctrine with its inherent flexibility and appeal to discretion rather than the more rigid collateral estoppel doctrine. In *Lagana*, the court sought a mechanism that would accord some weight to the earlier ruling without giving it full preclusive effect.¹³² Since collateral estoppel generally bars all further litigation on an issue, the court's description of its procedure

128. See *United States v. Paroutian*, 319 F.2d 661, 662-64 (2d Cir. 1963) (holding the prosecution properly justified search on retrial and explaining that the government's theory in the first trial was tailored to protect the identity of informant); The court in *People v. Edwards*, 458 P.2d 713, 719 (Cal. 1969), held that the evidence was improperly admitted; however, the court recognized that:

[i]t does not follow from this decision . . . that the evidence obtained after the arrests is inevitably inadmissible [because] [u]pon a retrial the prosecution may be able to establish that the evidence in question is not the "fruit" of the prior illegal search and that defendants were arrested upon probable cause apart from the evidence found in the trash can.

See also *People v. Heredia*, 20 Cal. App. 3d 194, 200 (Cal. Ct. App. 1971) ("We do not here determine that the prosecution may not on retrial be able to develop an objective basis of probable cause to justify the search of the vehicle.").

129. 946 F.2d 114, 117-18 (10th Cir. 1991) (emphasizing that the determination was one of law rather than fact).

130. *Id.*

131. In *Monsisvais*, the court analogized the appellate ruling on admissibility to an appellate determination that a conviction was not supported by sufficient evidence. *Id.* at 118. The analogy is flawed. An appellate holding that the evidence is insufficient to support the conviction is the equivalent of an acquittal and raises a double jeopardy bar. See *Burks v. United States*, 437 U.S. 1, 15-17 (1978).

132. *Commonwealth v. Lagana*, 509 A.2d 863, 863-67 (Pa. 1986).

as a limited form of collateral estoppel is confusing.¹³³ The approach in *Lagana* does not fit squarely within the traditional understanding of either collateral estoppel or the law of the case doctrine. The effect is far weaker than collateral estoppel, allowing further evidence and appellate review. It is also somewhat weaker than law of the case, allowing an appellate challenge to the ruling even if there is no reason to reopen the question. This modified law of the case approach best protects the defendant's interests and should be adopted to regulate offensive issue preclusion.

B. Evidence Issues

Evidentiary rulings made at one trial may play a role in a later related proceeding.¹³⁴ However, preclusion on evidence questions is generally inappropriate because these questions often turn on the specific factual context, which is likely to vary from one trial to the next.¹³⁵ In addition, the rulings often entail the exercise of discretion.¹³⁶ Each judge must have an appropriate level of control over her own courtroom and the administration of the trial over which she presides.

Although collateral estoppel ordinarily will not apply because a

133. See *Commonwealth v. Holder*, 805 A.2d 499, 507 n.14 (Pa. 2002) (recognizing that the court has modified the meaning of "collateral estoppel" in criminal cases).

134. Appellate resolution of an evidence question calls for stronger enforcement of the law of the case doctrine. The arguments for weakened application—variations in factual context, and the need for the trial court to retain discretion over courtroom administration—are entirely absent. See, e.g., *State v. Carter*, 114 S.W.3d 895, 902 (Tenn. 2003) (treating the law of the case as applying to appellate court's determination that two photographs were admissible in a murder trial). In *Carter*, when the evidence question was later raised before a different panel of the Court of Criminal Appeals, the law of the case bound that panel to defer to the ruling, absent extraordinary circumstances. *Id.*

135. See *United States v. Sanders*, 485 F.3d 654, 657 (D.C. Cir. 2007) ("For mid-trial evidentiary rulings, a new trial will result in different factual and evidentiary circumstances occasioning a new exercise of the district court's discretion."); *United States v. Todd*, 920 F.2d 399, 403-04 (6th Cir. 1990) (remarking that evidence rulings often turn on facts developed at trial); *United States v. Akers*, 702 F.2d 1145, 1148 (D.C. Cir. 1983) (noting that evidentiary rulings may depend on the way the particular trial unfolds). Bond questions are also extremely fact sensitive and subject to change as new facts become known to the court. See, e.g., *Dorsey v. Commonwealth*, 526 S.E.2d 787, 792 (Va. Ct. App. 2000) (affirming the trial court's revocation of bail where the trial court found that defendant "posed a threat to the community").

136. See 23A C.J.S. *Criminal Law* § 1636 (2006) ("Subject to the rules of competency and relevancy, the judge has wide discretion in the reception or rejection of evidence, including the permissible scope of testimony, and a trial court's evidentiary ruling will not be disturbed on appeal absent a clear abuse of discretion."); *People v. Evans*, 727 N.E.2d 1232, 1236 (N.Y. 2000) (rejecting the notion that the judge presiding over a retrial would be "corseted" by the prior judge's rulings, including those involving the play of discretion).

ruling on evidence does not constitute a final judgment,¹³⁷ the law of the case doctrine should sometimes apply. This will create some preclusive effect and act as a barrier to reconsideration. However, most evidence rulings should not become law of the case, and courts should recognize that, even when the law of the case doctrine applies, it has limited force on evidence questions.

Some courts entirely reject the argument that law of the case doctrine applies to evidentiary rulings.¹³⁸ In *People v. Evans*, for example, the defendant sought to retain the benefit of a pretrial ruling in his first trial that barred the prosecution from questioning him about any of his prior convictions.¹³⁹ In his second trial, Evans invoked law of the case and argued that the ruling had the same preclusive effect as a ruling on a motion to suppress. The court rejected his argument because the question involved the exercise of discretion, as opposed to a ruling on a motion to suppress, which entails findings of fact and conclusions of law, but no discretionary determinations.¹⁴⁰

Other courts apply the law of the case doctrine to evidentiary rulings, holding that it is ordinarily error for a trial judge to alter an evidentiary ruling on retrial.¹⁴¹ In *United States v. Estrada-Lucas*, for example, the defendant successfully argued that law of the case should have barred the court, in the defendant's second trial, from

137. *But see Holder*, 805 A.2d at 500-07. In *Holder*, the court applied collateral estoppel and gave a ruling on evidence an unusually strong effect. In *Holder*, the court held that a ruling in a hearing on probation revocation had collateral estoppel effect in the defendant's later trial on related criminal charges. *Id.* at 503. In the probation revocation hearing, the court applied the State's Rape Shield law to exclude specific defense evidence. Later, when the defendant moved to admit that evidence in his criminal trial, the court held that the prior ruling foreclosed further consideration of the issue. *Id.* at 501.

138. *See, e.g.*, *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (rejecting the argument that the doctrine precluded the trial court from reconsidering and altering rulings made in the initial trial).

139. 727 N.E.2d 1232, 1234-37 (N.Y. 2000).

140. *Id.*

141. *See, e.g.*, *United States v. Tham*, 960 F.2d 1391, 1397 (9th Cir. 1991) (“[U]nder the law of the case doctrine as applied by this circuit it is error for a court upon retrial to reverse an identical evidentiary ruling made during the first trial, barring clear error or a change in circumstances.”); *United States v. Estrada-Lucas*, 651 F.2d 1261, 1264-65 (9th Cir. 1980) (holding that a change in circumstances in the second trial was not sufficient to warrant the trial court's departure from a ruling in the first trial admitting defense evidence and stating “once the trial court had exercised its discretion to admit the evidence, it should not have deviated from the law of the case at the second trial in the absence of clear error or changed circumstances”). In *Tham*, despite its strong statement of the doctrine and the absence of any change in circumstances, the Ninth Circuit held that the trial court properly changed its ruling because its admission of the defense evidence in the first trial had been clear error. 960 F.2d at 1397-98.

deviating from a favorable evidence ruling in the first trial that admitted the defendant's polygraph evidence.¹⁴² The Ninth Circuit was not persuaded that changed circumstances called for a departure from the earlier ruling or that the earlier ruling was so clearly erroneous that the second court should have corrected it.¹⁴³ Similarly, in *Commonwealth v. McCandless*, the Pennsylvania Superior Court held that law of the case should have barred the second trial court from revisiting an issue settled in the first trial and affirmed on appeal.¹⁴⁴ In *McCandless*, the defendant argued that preliminary hearing testimony should not be admitted against him because he had not had a full and fair opportunity to question the witness at the hearing.¹⁴⁵ The ruling in his first trial admitting the testimony over his objection was law of the case, and the facts pertinent to the ruling had not changed. As a result, the court in the second trial should have treated the issue as barred.

However, when the law of the case doctrine applies to evidence questions, the doctrine may lack even its customary force.¹⁴⁶ Although the rulings are presumptively controlling, the effect of the doctrine is weak.¹⁴⁷ In *United States v. Boyd*, for example, the defendants won a new trial after their initial conviction.¹⁴⁸ The retrial was assigned to a different judge. In the second trial, the defendants argued, for the first time, that copies of recorded telephone conversations should not be admitted because they had not been shown to be reliable. The trial court declined to reconsider the issue. The Seventh Circuit concluded that the trial judge had given too great effect to the law of the case doctrine, stating that the effect on evidentiary rulings was either nonexistent or weak.¹⁴⁹

Some evidence rulings should have a stronger preclusive effect. A decision relating to the application of a privilege, for example, should be treated as law of the case. The question is not as sensitive to the particular factual posture of the question at trial; the relevant

142. 651 F.2d at 1264-65.

143. *Id.*

144. 778 A.2d 713, 720-21 (Pa. Super. Ct. 2001).

145. *Id.* at 714-15.

146. *See, e.g.*, *United States v. Todd*, 920 F.2d 399, 403-04 (6th Cir. 1990) (holding that the law of the case permitted the trial court to reconsider evidentiary questions previously ruled on by the judge from whom the case was transferred after the first trial culminated in a mistrial).

147. *See United States v. Boyd*, 208 F.3d 638, 642-43 (7th Cir. 2000); *People v. Evans*, 727 N.E.2d 1232, 1236 (N.Y. 2000); *see also People v. Nieves*, 492 N.E.2d 109, 116 (N.Y. 1986) (distinguishing between rulings on motions to suppress, which become the law of the case, and trial rulings on questions of evidence, which do not).

148. 208 F.3d at 640.

149. *Id.* at 642, 644-45 (concluding also that evidence was properly admitted in a second trial).

facts will likely remain the same from case to case. Moreover, the ruling does not call on the court to exercise discretion. Treating the decision as law of the case promotes consistency as well as efficiency and conservation of judicial resources, while still according the successor court some leeway to revisit the application of privilege law.

In *Weedon v. State*, the court correctly applied law of the case reasoning to a question of privilege.¹⁵⁰ In *Weedon*, the defendant claimed marital privilege in his first trial, but, after holding a hearing, the court held that the defendant had waived the privilege by publishing the otherwise confidential information to third parties. The court treated the ruling as law of the case but allowed reconsideration in the interests of justice. To support his request for reconsideration, the defendant presented affidavits establishing that the two key witnesses to the publication of the information had testified falsely and now recanted their testimony.¹⁵¹ This new evidence and the threat to the interests of justice overcame the law of the case doctrine and entitled the defendant to reconsideration.¹⁵² Thus, the doctrine provides some consistency but is sufficiently flexible to protect the interests of justice.

In *United States v. Harnage*, the Eleventh Circuit declined to give a determination regarding privilege law's preclusive effect.¹⁵³ Instead, the court should have applied law of the case. In *Harnage*, the court considered but rejected the prosecution's argument that collateral estoppel gave the ruling on privilege in one case preclusive effect in a related case. The defendant in the case was the object of two federal prosecutions—one in Florida and one in Texas. In each case, the defendant filed a motion to quash the indictment or suppress evidence based on the contention that the prosecution rested on privileged statements to his attorney, who had become an informant and provided information about the defendant to the government. The district court in Texas denied his motions, holding that there was no attorney-client relationship. The court in Florida then applied collateral estoppel and denied the defendant's motions. The defendant appealed the adverse rulings to the respective Courts of Appeals. The Fifth Circuit ultimately resolved the issue against the defendant.¹⁵⁴ The Eleventh Circuit focused solely on whether collateral estoppel barred the defendant from raising the issue.¹⁵⁵ The court concluded that policy considerations did not support the

150. 750 A.2d 521, 527-28 (Del. 2000).

151. *Id.* at 528.

152. *Id.*

153. 976 F.2d 633, 635-36 (11th Cir. 1992).

154. *Id.* at 634.

155. *Id.*

application of collateral estoppel against the defendant.¹⁵⁶ Declining to adopt the *Levasseur* test applied by the district court, the Eleventh Circuit noted that the test turns on “fuzzy and imprecise measurements.”¹⁵⁷ The Eleventh Circuit remanded the case, directing the trial court to make its own determination of whether the attorney-client privilege applied and specifically stating that the defendant could offer additional testimony.

Both the trial court and the court of appeals should have treated the Texas ruling as law of the case. Under that doctrine, the federal court in Florida would have treated the ruling as determinative unless the defendant demonstrated that one of the exceptions to the law of the case doctrine applied. In *Harnage*, the initial ruling was clearly not preliminary, tentative, or made on an incomplete record, and the controlling law had not changed. Therefore, unless the defendant had new evidence bearing on the application of the privilege or there was a risk of manifest injustice, the second court should have deferred on the privilege question.

C. Other Rulings on Nonevidentiary Defense Motions

Some other types of rulings may also have preclusive effect.¹⁵⁸ Barring relitigation of decided issues promotes consistency, efficiency, and conservation of judicial resources. However, the courts must assure that preclusion is applied in a manner that respects the defendant’s rights and provides sufficient process to lead to accurate results. The law of the case doctrine provides an appropriate vehicle for addressing most questions. The doctrine applies even to preliminary rulings and offers a flexible framework for identifying situations in which reconsideration is appropriate. To determine whether an earlier ruling has preclusive effect, the court should ask whether the relevant facts have changed and whether barring the defendant from addressing the issue would be unfair.

156. *Id.* at 635-36.

157. *Id.* at 635 (citing as examples the terms “sufficient incentive,” “relatively minor charges,” and “relatively favorable sentence”). The court also noted that no circuit court had adopted the *Levasseur* test. *Id.* The court further stated that the application of collateral estoppel against the defendant would require the district court to determine whether counsel in the first proceeding had rendered effective assistance. *Id.* at 636. This determination would entail a full review of the other proceeding, defeating the goal of judicial economy. *Id.*

158. Interestingly, the question tends to be raised by the defendant rather than the prosecution. Defendants assert that earlier adverse rulings are law of the case to overcome the argument that the ruling is no longer appealable because the defendant did not renew her motion in the later proceeding. There do not appear to be a significant number of cases where the prosecution effectively invoked collateral estoppel or law of the case to restrict reconsideration of a pretrial issue. *See generally id.* at 634 (“The [collateral estoppel] doctrine’s use in the criminal arena . . . has traditionally been limited to only one party—the defendant.”).

Whether a particular ruling becomes law of the case will often depend on whether the facts underlying the ruling are identical in the successor proceeding.¹⁵⁹ For example, a ruling that the indictment is sufficient should become law of the case. The determination is not based on facts that are subject to change.¹⁶⁰ If a change in the law requires reconsideration, the doctrine would permit the second court to revisit the issue. Similarly, a speedy trial ruling should be treated as law of the case unless it rests on factual determinations that are subject to change.¹⁶¹ Likewise, the denial of the defendant's motion to sever is also likely to turn on static facts and should therefore generally become law of the case.¹⁶²

159. See *Commonwealth v. Mulholland*, 702 A.2d 1027, 1036 n.6 (Pa. 1997) (stating that the law of the case applies only when the facts and issues underlying the ruling "are substantially the same"); see also *Commonwealth v. Starr*, 664 A.2d 1326 (Pa. 1995). In *Starr*, the trial court accepted the defendant's waiver of his right to counsel, permitting him to proceed pro se. The case was later transferred to a different trial judge, who revoked the order permitting the defendant to proceed pro se and required the defendant to proceed to trial represented by the public defender. *Id.* at 1330. The Pennsylvania Supreme Court held that the second court should not have revisited the issue in the absence of any change in the facts or law. Considering the law of the case doctrine, the order rescinding the initial court's order was error. *Id.* at 1339.

United States v. Crowley, 318 F.3d 401, 420 (2d Cir. 2003), represents an interesting application of law of the case. After the defendant's initial conviction, the Second Circuit granted him a new trial. In its opinion, the court held that the defendant waived a particular challenge to the indictment "by failing to raise it in advance of his first trial, as required by Fed. R. Crim. P. 12(b)(2)." *Id.* After he was retried and again convicted, the defendant again presented the same challenge to the indictment. The court held that its earlier decision was law of the case. *Id.* It appears that the doctrine was limited to the question of whether failure to raise the issue before trial was a waiver and did not bar the defendant from raising the issue in a timely manner in his second trial. Unfortunately, the defendant had again failed to raise the issue in the pretrial motions before his second trial. *Id.*

160. See, e.g., *People v. Rodriguez*, 664 N.Y.S.2d 311, 312 (App. Div. 1997) (holding that the first court's denial of the defendant's motion to dismiss the indictment was law of the case; therefore, the second court should not have considered arguments to the contrary or have dismissed the indictment); see also *People v. Johnson*, 517 N.Y.S.2d 31, 32 (App. Div. 1987) (holding that the second court properly refused to consider the defendant's motion to dismiss the indictment because an earlier ruling denying dismissal was law of the case).

161. See *United States v. Hoffecker*, 530 F.3d 137, 165 (3d Cir. 2008); see also *United States v. Sanders*, 485 F.3d 654, 657 (D.C. Cir. 2007) (citing law of the case doctrine and holding that the defendant did not need to raise the issue again before retrial). But see *United States v. Johnson*, 12 F.3d 1540, 1544-55 (10th Cir. 1993) (rejecting defendant's claim that the first judge's informal statement that the Speedy Trial Act required the case to go to trial within twelve days did not bind second judge under law of the case doctrine; in the absence of prejudice, the second judge was free to reconsider speedy trial requirements and had explained the computation).

162. See, e.g., *Commonwealth v. Jones*, 858 A.2d 1198, 1206 (Pa. Super. Ct. 2004) (holding that the initial denial of the "motion to sever charges" became the law of the case after the first two trials ended in mistrial). In *Jones*, the severance motion rested on the argument that the introduction of the codefendant's prior convictions would

The resolution of two cases addressing sufficiency of the evidence challenges illustrates the importance of whether the underlying facts remain the same. In *United States v. Burns*, the defendants were convicted, but the trial court granted a judgment of acquittal based on the conclusion that the evidence was insufficient to support the verdict.¹⁶³ The government appealed.¹⁶⁴ The circuit court held that the evidence was sufficient and remanded for sentencing. After sentencing, the defendants again appealed and once again challenged the sufficiency of the evidence. The case had not been retried, so the evidence was unquestionably identical. The Eleventh Circuit held that the law of the case doctrine barred reconsideration of the sufficiency in the second appeal.¹⁶⁵ As a result, even though it may have disagreed with the holding, the second panel was bound by the decision.

In contrast, in *United States v. Caudle*, the court rejected the prosecution's argument that the determination that the evidence was sufficient in the second trial of the case barred the defendant from contesting the sufficiency of the evidence introduced in the third trial of the case.¹⁶⁶ The court recognized that the sufficiency of the evidence must be reviewed after each trial because it may vary to some degree. The court therefore noted that a determination that the evidence is sufficient generally does not become law of the case.¹⁶⁷

unfairly prejudice the defendant. The pertinent facts thus remained the same in the later trial. *Id.* at 1208. In *Jones*, the defendant advanced the law of the case argument to support his claim that he could appeal the ruling and had not waived the issue by failing to raise it again before the later trial. *Id.*; *but see* *United States v. Hively*, 437 F.3d 752, 766 (8th Cir. 2006) (stating the ruling on severance was not the law of the case but also finding ample justification for reconsidering the ruling).

163. 662 F.2d 1378, 1380 (11th Cir. 1981).

164. *Id.* at 1380-84.

165. The court also cited a circuit rule. The court explained:

Defendants' attempt to present the same issue a second time conflicts with two principles that control our present review. The first is the rule that each panel of this court is bound by prior decisions of this court

The second is the law of the case doctrine, described . . . as the rule under which the trial court and appellate courts are bound by any findings of fact or conclusions of law made by the appellate court in a prior appeal of the case at issue. . . .

. . . .

. . . An exception to the doctrine excuses adherence to a prior holding that is clearly erroneous or would work manifest injustice. We acknowledge, as did the prior panel, that the sufficiency of the evidence in this case presented an extremely close question. If the issue had been presented to us for the first time we may well have decided it differently. We conclude, however, that our deviation from the prior panel's holding would be unwarranted.

Id. at 1383-84.

166. 758 F.2d 994, 997 (4th Cir. 1985).

167. *See id.*

The law of the case doctrine should never apply if the issue's resolution depends on the circumstances in existence only in the later trial. For example, in *Commonwealth v. Mulholland*, the defendants sought to retain the benefit of a ruling granting their motion for change of venue based on pretrial publicity after the first trial ended in a mistrial.¹⁶⁸ The court held that the ruling did not become the law of the case because the court had to assess the impact of the publicity at the time of trial.¹⁶⁹ Thus, the information bearing on the ruling was necessarily different at the time of the second trial.

Even when it applies, the law of the case doctrine should be tempered by concerns of fairness. In *Turner v. State*, the defendant unsuccessfully argued on direct appeal that the trial court should have granted his request for lesser-included offense instructions.¹⁷⁰ On the other hand, his codefendant, with whom he had been tried jointly, made the same argument on appeal and received a favorable ruling from a different panel of the appellate court, which granted him a new trial. The defendant then sought reconsideration through a postconviction petition. Although the unfavorable ruling was the law of the case, the court concluded that reconsideration was necessary to avoid a miscarriage of justice and reversed the defendant's conviction.¹⁷¹

In contrast, *United States v. Rivera-Martinez* illustrates the force with which the doctrine may be applied to bar the defendant from pursuing a claim.¹⁷² In *Rivera-Martinez*, the defendant made repeated efforts to withdraw his guilty plea. In his first challenge to the plea, the trial court concluded that he had not demonstrated any sufficient reason.¹⁷³ The First Circuit agreed but remanded the case for resentencing, allowing the defendant to undergo a mental examination before he was resentenced.¹⁷⁴ The defendant underwent psychological evaluation and then used the result to again attack his plea, arguing that he was not competent to enter the plea; the trial

168. 702 A.2d 1027, 1035-36 (Pa. 1997).

169. *Id.*

170. 751 N.E.2d 726, 728-29 (Ind. Ct. App. 2001).

171. *Id.* at 734; *see also* *Hopkins v. State*, 782 N.E.2d 988, 990-91 (Ind. 2003) (stating that an earlier decision was the law of the case but nevertheless addressing the merits of defendant's argument). In *Hopkins*, the defendant was seeking relief based on favorable result his brother/codefendant obtained on appeal. The Supreme Court of Indiana first concluded that law of the case barred reconsideration of the defendant's claim, but then addressed the merits and concluded that the defendant's situation was sufficiently different from his brother's because the defendant did not suffer the type of prejudice that constitutes a fundamental error. *Id.* at 990-92. The court thus addressed the consistency concern.

172. 931 F.2d 148, 150-52 (1st Cir. 1991).

173. *United States v. Rivera-Martinez*, 693 F. Supp. 1358, 1363-65 (D.P.R. 1988).

174. *Rivera-Martinez*, 931 F.2d at 149.

court again denied the motion to withdraw the plea.¹⁷⁵ The First Circuit stated unequivocally that the trial court should not have revisited the issue of whether there was any basis to allow the defendant to withdraw the plea.¹⁷⁶ The determination on that issue was law of the case, and no exception to the doctrine applied.

The law of the case doctrine thus provides a mechanism to promote consistent rulings on a wide range of issues. The doctrine recognizes the force of even preliminary rulings in the same proceeding, yet it is flexible enough that courts can allow relitigation when it is essential to achieve a fair result.

D. Using Prior Convictions on Issues Related to Guilt or Innocence

When a defendant has been convicted on related charges, the prosecution would like to use that conviction to maximum advantage in the related trial. For example, if the defendant is charged with felony murder and has already been convicted of the underlying felony, the prosecution would like to limit the jury's consideration of the underlying felony or, at the very least, streamline its case by introducing proof of the prior conviction. The prosecution has some strong arguments: if the jury in the second proceeding is unaware of the defendant's conviction, the jury is more likely to reach an inconsistent result—one favorable to the defendant. In addition, using the conviction to establish essential facts conserves both judicial and prosecutorial resources. However, countervailing interests should lead courts to rebuff prosecution efforts to employ offensive issue preclusion on issues of guilt or innocence.

In this context, the prosecution generally tries to use one of two possible consistency-promoting approaches. First, the prosecution may invoke collateral estoppel, seeking to give the prior conviction preclusive effect.¹⁷⁷ If the court applies collateral estoppel, the court will instruct the jurors that they are not to consider the foreclosed issue and that they are to treat certain facts as established.¹⁷⁸ In the

175. *Id.* at 149-50.

176. *Id.* at 151-52.

177. It seems unlikely that the law of the case doctrine could be used this way. *See supra* Part II.C. Law of the case acts only as a constraint on judicial decisionmaking. *See supra* Part II.C. Only a doctrine as robust as collateral estoppel or *res judicata* could justify taking an issue away from the jury. *See State v. Scarbrough*, 181 S.W.3d 650, 654 n.2 (Tenn. 2005) (noting that law of the case does not apply to foreclose a defendant from contesting guilt of underlying felony in a felony murder trial); *Allen v. State*, 995 A.2d 1013, 1018 n.2 (Md. Ct. Spec. App. 2010) (rejecting the argument that under the law of the case doctrine the appellate affirmance of defendant's armed robbery conviction became law of the case and barred defendant from contesting the commission of the felony in his felony murder trial).

178. *See, e.g., People v. Ford*, 416 P.2d 132, 137-38 (Cal. 1966) (approving

felony murder example, the trial court would tell the jurors that the defendant had been convicted of the underlying felony and that they should treat the fact that the defendant committed that offense as established.¹⁷⁹

Alternatively, the prosecution may seek to introduce the prior conviction as evidence on the contested issue rather than foreclosing the issue altogether. If the court admits the conviction without giving it preclusive effect, the court would charge the jury that it must determine whether the evidence established beyond a reasonable doubt that the defendant committed the underlying felony along with the other issues in the case.¹⁸⁰ The prior conviction would be admitted as part of the prosecution evidence, informing the jury that the defendant was already convicted of the underlying felony.¹⁸¹

Each of these approaches is discussed below. However, neither approach should be permitted as both compromise the defendant's right to a fair trial on all issues. Further, neither is warranted by the relevant policy considerations. Instead, even if the defendant has been convicted on related charges, the prosecution should bear the burden of establishing all the elements of the offense for which the defendant is on trial.

1. Collateral Estoppel

When the defendant has already been convicted on related charges, the prosecution may attempt to achieve consistency and efficiency by invoking collateral estoppel to bar the defendant from relitigating the issues established by the prior conviction.¹⁸² Some commentators have advocated such use of offensive collateral

instructions in a felony murder case that told the jury that "defendant had been convicted of . . . various felonies" and that the only issues for consideration were defendant's intent and whether the homicide occurred during the commission of the felonies).

179. *See id.* at 138 ("[I]t was not error for the trial court to give appropriate instructions that defendant had been convicted of the various felonies, and that if they found that defendant's commission of such felonies was conjoined with his commission of the homicide, they might predicate their verdict on the felony-murder rule . . .").

180. *See* United States v. Tocco, 200 F.3d 401, 417-18 (6th Cir. 2000).

181. *See id.* (ruling that the jury could use the conviction of codefendants as evidence, in part, because judge did not give collateral estoppel instructions).

182. *See, e.g.,* State v. Johnson, 594 A.2d 1288, 1293 (N.H. 1991) (prohibiting prosecution from invoking collateral estoppel and using evidence of a prior conviction to prove facts that the prosecution would otherwise need to prove beyond a reasonable doubt when the interests served by such use of collateral estoppel would only be slight); *see also* United States v. Bejar-Matrecios, 618 F.2d 81, 83 (9th Cir. 1980) ("The general rule is that the doctrine of collateral estoppel applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea."); *cf. Ford*, 416 P.2d at 137-38 (approving offensive collateral estoppel where its use serves to prove elements of the current charge).

estoppel, and the courts have occasionally permitted the prosecution to use collateral estoppel to bar a defendant from relitigating issues relevant to guilt or innocence.¹⁸³ Others have rejected this application of offensive collateral estoppel, either viewing it as unconstitutional or as unjustified by policy concerns.¹⁸⁴ The propriety of this use of collateral estoppel remains unsettled and continues to spark controversy.¹⁸⁵ This use of collateral estoppel is at odds with the defendant's constitutional trial rights and is not well supported

183. See Vestal, *supra* note 18, at 312 (noting that it is "reasonable" to allow the prosecution to invoke collateral estoppel to bar a defendant from relitigating issues that the defendant already had the opportunity to litigate); Kennelly, *supra* note 98, at 1404-05 (arguing that offensive collateral estoppel should be allowed in certain situations); Hernandez-Uribe v. United States, 515 F.2d 20, 21 (8th Cir. 1975) (allowing the prosecution to bar a defendant from relitigating his alien status when defendant had pled guilty to the same charge in earlier prosecution); Carmody v. Seventh Judicial Dist. Court, 398 P.2d 706, 707 (Nev. 1965) (holding that defendants who pleaded guilty to robbery may be precluded in their murder trial from asserting that they did not commit the robbery).

184. See, e.g., Michael P. Daly, Note, "Give Me Your Tired, Your Poor," *Your Collaterally Estopped Masses? Guilty Pleas and Collateral Estoppel of Alienage in Criminal Proceedings*: United States v. Gallardo-Mendez, 44 VILL. L. REV. 671, 672 (1999) (arguing that collateral estoppel should not be applied against the defendant on guilt-innocence issues).

185. See United States v. Sandoval-Gonzales, 642 F.3d 717, 722-23 (9th Cir. 2011) (emphasizing *Smith-Baltiher* holding prohibiting the use of collateral estoppel and stating that a criminal defendant "faces no burden whatsoever" regarding presenting evidence of derivative citizenship in subsequent alienage cases (citing United States v. Smith-Baltiher, 424 F.3d 913, 917-22 (9th Cir. 2005))). *But see* State v. Dempsey, 193 P.3d 874, 877-78 (Idaho Ct. App. 2008) (allowing prosecution use of collateral estoppel to bar the defendant from relitigating whether he violated the terms of his probation, and distinguishing this case from ones that prohibit offensive collateral estoppel relating to findings of substantive guilt). The United States Supreme Court has never put this issue to rest. Allen v. State, 995 A.2d 1013, 1022 (Md. Ct. Spec. App. 2010) (noting that the Supreme Court has not addressed the issue).

In *Simpson v. Florida*, 403 U.S. 384, 386 (1971), in a short per curiam opinion, the Court appeared to dismiss out of hand the offensive use of collateral estoppel on an element of the charge. The defendant was charged with robbing a store and was convicted at trial. He obtained reversal of his conviction and was acquitted on retrial. He was then charged with robbing a customer of the store. The trial court declined to treat the acquittal as raising a collateral estoppel bar to reprosecution, reasoning that the initial conviction would support pro-prosecution collateral estoppel. *Id.* The Court stated in dictum that "the prosecutor could not, while trying the case under review, have laid the first jury verdict [of guilty] before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night." *Id.*

Similarly, in *Ashe v. Swenson*, Justice Burger, in his dissenting opinion, stated that:

[C]ourts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to *both* parties, as is true in civil cases, *i./e.*, here, if Ashe had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial.

397 U.S. 436, 464-65 (1970) (Burger, J., dissenting).

by the policies underlying the doctrine.¹⁸⁶ Even the United States Department of Justice has evidenced doubt concerning the propriety of this particular application of collateral estoppel, confessing error before the Ninth Circuit on this issue.¹⁸⁷ Although the government's posture is likely to stop development of the issue in the federal courts,¹⁸⁸ this has no bearing on state cases.¹⁸⁹ The courts should put the issue to rest once and for all, prohibiting offensive use of

186. See *United States v. Pelullo*, 14 F.3d 881, 891 (3d Cir. 1994) (referring to “a strong, unelaborated assumption that the doctrine of collateral estoppel cannot be invoked in criminal cases against the defendant”); *United States v. De Angelo*, 138 F.2d 466, 468-69 (3d Cir. 1943) (quoting *United States v. Carlisi*, 32 F. Supp. 479, 482 (E.D.N.Y. 1940)) (“An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury’s independent finding with respect thereto. But a ‘rule of evidence’ has been recognized ‘which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial.’”); *United States v. Peterson*, No. 2:08-mj-16, 2008 WL 4922413, at *5 (D.N.D. Nov. 12, 2008) (noting differences among the circuits); *United States v. Carlisi*, 32 F. Supp. 479, 482 (E.D.N.Y. 1940) (stating that use of collateral estoppel against defendant would violate the constitutional right to trial); *People v. Goss*, 503 N.W.2d 682, 686-87 (Mich. Ct. App. 1993) (holding that applying collateral estoppel to instruct a jury that defendant in a felony-murder trial had been convicted of the requisite felony would violate constitutional rights); see also *Daly*, *supra* note 184; Comment, *Collateral Estoppel*, *supra* note 43, at 521-24 (considering whether the use of collateral estoppel against defendant violates the right to trial by jury). The use of a conviction based on a guilty plea raises additional problems. See *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1243-45 (10th Cir. 1998) (discussing three bases for why conviction based on a guilty plea causes problems); *Vestal*, *Issue Preclusion*, *supra* note 18, at 295. However, I do not propose to explore the subissues raised when the first case culminated in a guilty plea because the arguments for collaterally estopping the defendant are so problematic.

187. *United States v. Arnett*, 353 F.3d 765, 765-66 (9th Cir. 2003) (en banc) (per curiam) (“In federal criminal trials, the United States may not use collateral estoppel to establish, as a matter of law, an element of an offense or to conclusively rebut an affirmative defense on which the Government bears the burden of proof beyond a reasonable doubt.” (citation omitted)).

188. See, e.g., *Sandoval-Gonzalez*, 642 F.3d at 722 n.5 (stating that the law of the circuit prohibits the offensive use of collateral estoppel to establish an element of the offense or “to conclusively rebut an affirmative defense” (quoting *United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005)); accord *Arnett*, 353 F.3d at 766; *United States v. Burge*, No. 08 CR 846, 2010 WL 899147, at *3 n.6 (N.D. Ill. Mar. 9, 2010) (citing government confession of error in *Arnett* and noting that the defendant was not barred from relitigating issue related to guilt); *United States v. Lopez-Hernandez*, No. 06-645, 2007 WL 608111, at *3 (N.D. Cal. Feb. 23, 2007) (citing *Smith-Baltiher* and *Arnett* to reject prosecution’s argument that defendant was estopped from contesting validity of deportation order that provided foundation for illegal reentry prosecution).

189. The position of the federal government adds weight to defense arguments in state cases. See, e.g., *Allen*, 995 A.2d at 1026-27 (citing government concession in *Arnett* in support of a holding that the offensive use of collateral estoppel to establish an element of an offense is not generally constitutional).

collateral estoppel on issues of guilt or innocence.¹⁹⁰

Both state and federal precedent addressing this use of offensive collateral estoppel are divided.¹⁹¹ The majority of courts are extremely reluctant to apply offensive collateral estoppel against the defendant to preclude jury consideration of an element of the charged offense or to bar defense evidence.¹⁹² Nevertheless, some courts have allowed the prosecution to use offensive collateral estoppel to bar defendants from relitigating issues bearing on guilt.¹⁹³

For example, in *United States v. Arnett*, the Ninth Circuit approved the offensive use of collateral estoppel to foreclose the presentation of a defense.¹⁹⁴ In *Arnett*, the defendant was first convicted of bank robbery in state court and then charged in federal

190. It is worth noting that (1) if the prosecution has to establish an issue that was previously the subject of a trial involving the defendant and (2) if a witness has become unavailable or if a witness changes her testimony at the second trial, then (3) the prosecution can use testimony from that trial to prove the case. See FED. R. EVID. 801(d)(1)(A), 804(b)(1) (discussing prior inconsistent statements and former testimony).

191. See, e.g., *Goss*, 503 N.W.2d at 684-86 (deciding, over dissent, that the proposed offensive use of collateral estoppel to establish facts relating to an essential element of the prosecution would violate the defendant's right to trial by jury and noting that federal and state courts have been divided over whether to invoke collateral estoppel).

192. See *United States v. Pelullo*, 14 F.3d 881, 896 (3d Cir. 1994) (stating that collateral estoppel "interferes with the power of the jury to determine every element of the crime, impinging upon the accused's right to a jury trial"); *United States v. Harnage*, 976 F.2d 633, 635 (11th Cir. 1992) (declining to apply collateral estoppel to the prosecution because the court was not convinced that "allowing the government to bar a defendant from relitigating an unfavorable determination of facts in a prior proceeding would serve the original goal of collateral estoppel—judicial economy"); *Gutierrez v. People*, 29 Cal. Rptr. 2d 376, 378-91 (Cal. Ct. App. 1994) (summarizing cases on the general principles of collateral estoppel); *State v. Stiefel*, 256 So. 2d 581, 585 (Fla. Dist. Ct. App. 1972) (condemning offensive use of collateral estoppel); *Allen*, 995 A.2d at 1022-26 (discussing cases and rejecting the use of offensive collateral estoppel); *State v. Johnson*, 594 A.2d 1288, 1293 (N.H. 1991) (rejecting argument that first trial sufficiently protects defendant's constitutional rights and holding that collateral estoppel does not apply); *State v. Thompson*, 285 S.W.3d 840, 849 (Tenn. 2009) (recognizing that the prosecution cannot use collateral estoppel offensively against defendant). In *United States v. Dixon*, Justice Scalia noted that "a conviction in the first prosecution would not excuse the Government from proving the same facts the second time." 509 U.S. 688, 710 n.15 (1993); see also Catlett, *supra* note 17, at 372-74 (summarizing law); Vestal, *supra* note 18, at 312-13 n.188 (citing cases declining to apply issue preclusion against the defendant).

193. See *Hernandez-Uribe v. United States*, 515 F.2d 20, 21-22 (8th Cir. 1975) (holding that collateral estoppel could apply to whether the defendant was an alien, an element of the crime); *Carmody v. Seventh Jud. Dist. Ct.*, 398 P.2d 706, 707 (Nev. 1965) (allowing defendants' conviction of robbery to preclude them from contesting that they were the robbers in the murder trial arising from the same episode); *Johnson*, 594 A.2d at 1292-93 (adopting a balancing test to weigh the state interests against the defendants' to see if offensive collateral estoppel should apply); see also Vestal, *supra* note 18, at 314 n.192 (citing cases).

194. 327 F.3d 845, 850-51 (9th Cir. 2003).

court in California and Oregon with committing a bank robbery and with using a firearm during a crime of violence.¹⁹⁵ Tried first in Oregon, he attempted unsuccessfully to establish that the firearm he used was an antique, seeking to avoid the firearm conviction. When he sought to introduce evidence that the firearm was an antique in his second federal trial, the court held he was collaterally estopped.¹⁹⁶ The defendant appealed. The Ninth Circuit concluded that the case satisfied the basic requirements for collateral estoppel, characterizing it as “a classic example of the proper application of collateral estoppel.”¹⁹⁷ The court did not view the offensive use of the doctrine in the case as unfair.¹⁹⁸ The court distinguished Arnett’s case from the adverse precedent in other circuits on the ground that the application of collateral estoppel only foreclosed an affirmative defense and did not “eliminate the government’s burden to prove every element of the [] offense.”¹⁹⁹ Instead, the court dismissed the constitutional arguments by pointing out that the defendant had received the benefit of a trial by jury and the opportunity to cross-examine witnesses in the first proceeding. In closing, the court endorsed the use of collateral estoppel:

Allowing Arnett to relitigate his antiquity defense after a full and fair opportunity to do so in Oregon would result in a needless waste of scarce judicial resources and would threaten the integrity of the judicial process by increasing the chance of an inconsistent verdict. No constitutional provision requires such a result.²⁰⁰

Thus, as recently as 2003, the Ninth Circuit came down strongly on the side of supporting the use of offensive collateral estoppel to foreclose jury consideration of a substantive issue at trial.²⁰¹

Some courts and commentators argue for a narrow application of offensive collateral estoppel, contending that cases involving status issues are exceptional and that collateral estoppel should be allowed to bar relitigation of those issues.²⁰² They argue that the consistency

195. *Id.* at 847.

196. *Id.*

197. *Id.* at 850.

198. *Id.*

199. *Id.* at 851.

200. *Id.*

201. Ultimately, the government confessed error, conceding that the use of collateral estoppel was improper. *Id.* at 765-66. As a result, the issue went no further.

202. *See, e.g.,* United States v. Bejar-Matrecios, 618 F.2d 81, 84 (9th Cir. 1980) (finding that the government could not use defendant’s guilty plea but also recognizing that in certain limited situations a guilty plea “may be relevant in a subsequent criminal proceeding to establish material facts necessary to sustain the prior judgment”); Pena-Cabanillas v. United States, 394 F.2d 785, 787 (9th Cir. 1968) (reasoning that the prosecution could invoke collateral estoppel because the issue of alienage was fully litigated in the former trial and not applying the doctrine would

concerns are sufficiently strong to overcome the defendant's interests.²⁰³ In *People v. Mojado*, the court held that the prosecution could use the defendant's prior conviction of nonsupport, which established his status as the father, to bar him from contesting paternity in a successive nonsupport action.²⁰⁴ The court emphasized the interest in consistency, citing the specter of inconsistent findings that could occur in Mojado's case. The court feared that if the defendant could repeatedly litigate the issue of paternity in successive trials, he might eventually win a favorable verdict, leading to inconsistent judicial determinations of the question.²⁰⁵

Similar reasoning has led to the approval of offensive collateral estoppel to establish the defendant's status as an alien in prosecutions for illegal entry and similar offenses.²⁰⁶ If collateral

encourage future entries); *Allen v. State*, 995 A.2d 1013, 1026-27 (Md. Ct. Spec. App. 2010) (citing alienage cases as involving particular concerns of judicial economy but also questioning their continued viability).

203. See, e.g., *Hernandez-Uribe v. United States*, 515 F.2d 20, 22 (8th Cir. 1975) (reasoning that the government could estop defendant from litigation of the issue of alienage because of strong evidence of defendant's unchanged alien status); *Bejar-Matrecios*, 618 F.2d at 84 (reasoning that the prior guilty plea could not be used because "its probative value was outweighed by possible prejudice to the defendant"); *United States v. Rangel-Perez*, 179 F. Supp. 619, 625-26 (S.D. Cal. 1959) (reasoning that the government could estop defendant from relitigating the issue of alienage because it promotes consistency and deters aliens from future entries).

204. 70 P.2d 1015, 1016 (Cal. Dist. Ct. App. 1937). *Mojado* was also cited in *People v. Ford*, 416 P.2d 132, 137-38 (Cal. 1966), to bar relitigation of guilt of the felony in a felony-murder case and in *United States v. Rangel-Perez*, 179 F. Supp. 619, 622 (S.D. Cal. 1959), to support the application of collateral estoppel to bar a defendant from relitigating the issue of alienage.

The facts of *Mojado* limit its precedential force. The defendant was convicted of failing to provide child support. 70 P.2d at 1015. He completed two years probation and then, as allowed by California law, he changed his plea and the original charge was dismissed. He then stopped providing child support and, when he was again charged criminally, he claimed he was not the father. At the second trial, the earlier case had a threefold impact: the complete record of the earlier trial was admitted in evidence; there was a stipulation that the mother of the child would testify that the defendant was the father; and the court sustained an objection to the defendant's offered testimony denying paternity. *Id.* The defendant conceded that under normal circumstances the initial conviction would have preclusive effect and argued only that the dismissal vitiated the effect of the conviction. The court rejected his argument for a variety of reasons. *Id.* at 1016-17.

205. *Id.* at 1017.

206. See, e.g., *Bejar-Matrecios*, 618 F.2d at 83-84 (recognizing that a conviction based on guilty plea could support offensive use of collateral estoppel to establish alienage); *Hernandez-Uribe*, 515 F.2d at 21-22; *Pena-Cabanillas*, 394 F.2d at 787; *Rangel-Perez*, 179 F. Supp. at 619; see also *Allen*, 995 A.2d at 1025 (discussing cases); 18B WRIGHT, *supra* note 2, § 4416 (mentioning status as particularly appropriate for issue preclusion). See generally Michelle S. Simon, *Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back*, 34 U. MEM. L. REV. 753, 769-73 (2004) (discussing cases); Daly, *supra* note 184, at 675-77 (discussing alienage cases).

estoppel is not applied, it is argued, the government is faced with the prospect of having to reestablish alien status after each reentry and the possibility that different juries will arrive at inconsistent results.²⁰⁷

Nevertheless, the precedent allowing offensive use of collateral estoppel is weak. On closer inspection, some key decisions that appear to offer support actually rest on a weak foundation. For example, the Ninth Circuit's decision in *United States v. Colacurcio*,²⁰⁸ frequently cited for the proposition that the prosecution can use collateral estoppel to establish an element of the offense, provides slight support for that proposition.²⁰⁹ In *Colacurcio*, the defendant had been convicted in a related conspiracy prosecution; the prosecution in the later trial on tax evasion charges persuaded the trial court to apply collateral estoppel against the defendant and instruct the jury to consider as proven that the defendant received certain payments during the tax years in question.²¹⁰ The Ninth Circuit concluded that collateral estoppel could be applied offensively in criminal cases.²¹¹ However, the court's reasoning in support of its assertion was limited. The court cited two cases applying collateral estoppel on the question of alienage and rejected the defendant's constitutional challenge in a single sentence, reasoning that the defendant's rights to trial by jury and confrontation of witnesses were fully accorded to him in the first trial.²¹² Moreover, the court then went on to conclude that the amounts of the payments and the amount retained by the defendant had not been resolved by the former prosecution and that the instruction was in error. Thus, *Colacurcio*'s thinly reasoned endorsement of offensive collateral estoppel is dictum.²¹³

In *People v. Ford*, the California court approved offensive use of collateral estoppel in a felony murder trial, giving preclusive effect to

207. *Hernandez-Uribe*, 515 F.2d at 21-22; *Pena-Cabanillas*, 394 F.2d at 787; *Rangel-Perez*, 179 F. Supp. at 619.

208. 514 F.2d 1 (9th Cir. 1975).

209. See *United States v. Colacurcio*, 514 F.2d 1, 6 (9th Cir. 1975); see also *Holland v. Anderson*, 583 F.3d 267, 281 (5th Cir. 2009) (citing *Hernandez-Uribe* for the proposition that courts "have permitted findings of guilt to estop a defendant in a later proceeding"); *State v. Ingenito*, 432 A.2d 912, 924 (N.J. 1981) (citing *Colacurcio* to support that statement that courts permit collateral estoppel when "a jury had resolved the factual issues against the defendant").

210. 514 F.2d at 3.

211. *Id.* at 6.

212. *Id.* (relying on *Frank v. Mangum*, 237 U.S. 309 (1915), and *United States v. Fabric Garment Co.*, 366 F.2d 530 (2d Cir. 1966), when determining that "the amount of the Berger payments was not a necessary element of the conviction in the prior case and was not . . . subject to collateral estoppel").

213. See *id.*

the felony convictions.²¹⁴ Although the holding favors offensive collateral estoppel, *Ford* is also lightly reasoned. The court did not assess the implications of offensive collateral estoppel. Instead, the court relied principally upon *People v. Beltran*, and the decisions it cited.²¹⁵ However, in *Beltran*, the defendant was attempting to use acquittal to restrict the prosecution's evidence. Most of the decisions the court relied upon in *Beltran* likewise concerned preclusion by the defendant, not the prosecution.²¹⁶ Indeed, one of the cases cited in *Beltran*, *United States v. De Angelo*, expressed unambiguous opposition to offensive use of collateral estoppel.²¹⁷ The notable exception was *People v. Mojado*, a case involving the determination of paternity, discussed above.²¹⁸

Moreover, even the support for allowing offensive collateral estoppel to foreclose relitigation of the question of the defendant's status has waned. In *United States v. Gallardo-Mendez*, for example, the Tenth Circuit rejected the argument that the defendant's prior guilty plea precluded him from contesting whether he was an alien.²¹⁹ The court discussed the offensive use of collateral estoppel and concluded that it could not follow a guilty plea. The Tenth Circuit concluded that allowing the prosecution to invoke collateral estoppel based on a guilty plea would not serve the policy justifications for the doctrine.²²⁰ The court emphasized that the policy justifications "do not have the same weight and value in criminal

214. 416 P.2d 132, 137-38 (Cal. 1966). *Ford* appears to be good law. In *Gutierrez v. People*, the California Court of Appeal considered *Ford* at length and distinguished it before holding that the use of offensive collateral estoppel in the case before the court denied the defendant a fair trial. 29 Cal. Rptr. 2d 376, 384-86 (Cal. Ct. App. 1994); see also *People v. Goss*, 503 N.W.2d 682, 688-89 (1993) (Griffin, J., dissenting) (citing *Ford* to support the argument in favor of preclusion in felony-murder case). Some other older cases also applied collateral estoppel in felony-murder cases to bar the defendant from relitigating the commission of the felony of which the defendant was already convicted. See *Vestal*, *supra* note 18, at 317 (citing cases).

215. 210 P.2d 238 (Cal. Dist. Ct. App. 1949).

216. See *id.* at 241-43.

217. 138 F.2d 466 (3d Cir. 1943). The Third Circuit stated:

The matter is one of collateral estoppel of the prosecutor. Nor can there be any requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto.

Id. at 468.

218. 70 P.2d 1015 (Cal. Dist. Ct. App. 1937).

219. 150 F.3d 1240, 1246 (10th Cir. 1998). The court's reasoning turned in part on the standard of proof applied to a guilty plea, which is less than proof beyond a reasonable doubt required at trial. *Id.*; see also *Daly*, *supra* note 195 (discussing *Gallardo-Mendez*).

220. *Gallardo-Mendez*, 150 F.3d at 1243-44.

cases.”²²¹ The court reversed the conviction that followed the trial court’s use of instructions to take the question of alienage away from the jury.²²²

More recently, the government has conceded that the offensive use of collateral estoppel to establish status as an alien is improper.²²³ In *United States v. Smith-Baltiher*, an illegal reentry case, the defendant had previously pleaded guilty to illegal entry offenses and had stipulated in those pleas that he was not a citizen of the United States.²²⁴ When he was again charged with illegal reentry, the defendant sought to raise a defense of derivative citizenship based on the claim that his mother was born in the United States. The prosecution moved to collaterally estop the defendant from contesting his status as an alien, and the trial court agreed. The court allowed the prosecution to use the prior guilty pleas to establish that the defendant was not a citizen and precluded the defendant from offering contrary evidence.²²⁵ As the Ninth Circuit remarked, the defendant was thus barred from contesting two elements of the charged offense and from presenting evidence to support two possible defenses.²²⁶ The Ninth Circuit acknowledged that at the time of the trial court’s ruling, offensive use of collateral estoppel was permitted.²²⁷ However, as in *Arnett*, the government conceded that it could not use collateral estoppel offensively.²²⁸ As a result, the defendant should have been permitted to contest all the elements of the offense and to present his defense evidence.²²⁹

221. *Id.* at 1244.

222. *Id.* at 1246; *see also* *United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005) (reversing defendant’s conviction in part because the trial court applied collateral estoppel to preclude the defendant from contesting his alienage in a prosecution for illegal reentry). In *Smith-Baltiher*, the court did not assess the issue in depth. Instead, the court merely recognized conflicting precedent and relied on the government’s concession that “the use of offensive collateral estoppel is not proper.” *Id.* at 920.

223. *Smith-Baltiher*, 424 F.3d at 920.

224. *Id.* at 916.

225. *Id.* at 917-19.

226. *Id.* at 918-19.

227. *Id.*

228. *Id.* at 920; *United States v. Arnett*, 353 F.3d 765, 765-66 (9th Cir. 2003) (en banc) (per curiam).

229. This type of information could come to light after an initial plea in a different case. The practice of accepting mass guilty pleas in reentry cases increases the likelihood that issues will be overlooked. *See United States v. Roblero-Solis*, 588 F.3d 692, 699-700 (9th Cir. 2009) (holding that a court addressing approximately fifty defendants at one time to accept mass guilty pleas for illegal entry charges deprives the defendants of their right to be personally addressed in court); *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1060 (9th Cir. 2011) (holding in illegal entry case that the gap of time between the judge addressing mass defendants of their rights and defendant’s individual questioning violates the requirement for defendants to be

Offensive use of collateral estoppel to establish an element of the offense is inconsistent with the constitutional right to trial by jury.²³⁰ In the leading case against offensive use of collateral estoppel, *United States v. Pelullo*, the Third Circuit held that the trial court committed error by instructing the jury to give collateral estoppel effect to an earlier conviction to establish a predicate act in a racketeering case.²³¹ The court condemned the decisions supporting offensive use of collateral estoppel as “subordinat[ing] the defendant’s constitutionally guaranteed right to a jury trial to concerns for efficient judicial administration and judicial perceptions of expeditious public policy.”²³² The court concluded that offensive use of collateral estoppel is incompatible with the Sixth Amendment right to trial by jury.²³³ Other courts have reached the same conclusion.²³⁴

personally addressed in court).

230. See *Allen v. State*, 995 A.2d 1013, 1026 (Md. Ct. Spec. App. 2010) (barring State’s use of offensive collateral estoppel to establish a material element of the crime “is consistent with the right of a criminally accused person to trial by an impartial jury”); *State v. Ingenito*, 432 A.2d 912, 914-19 (N.J. 1981) (discussing right to jury trial and presumption of innocence and concluding that the offensive use of collateral estoppel violated defendant’s rights); see also *State v. Stiefel*, 256 So. 2d 581, 585 (Fla. Dist. Ct. App. 1972) (condemning the offensive use of collateral estoppel in dictum). But see *Vestal*, *supra* note 18, at 319-21 (arguing that no constitutional deprivation occurs because the defendant already received a trial to determine issue). See generally *Simon*, *supra* note 206, at 775-80 (discussing constitutional arguments and concluding offensive use of collateral estoppel does not violate the Constitution).

231. 14 F.3d 881, 897 (3d Cir. 1994).

232. *Id.* at 891.

233. *Id.* at 895.

234. See, e.g., *Gutierrez v. People*, 29 Cal. Rptr. 2d 376, 386 (Cal. Ct. App. 1994) (reversing defendant’s murder conviction on the ground that the trial court had violated defendant’s right to a fair trial because it applied offensive collateral estoppel and deprived defendant of the opportunity to present his defense); *Allen*, 995 A.2d at 1021 (holding that offensive use of collateral estoppel violated defendant’s right to a fair trial); *People v. Goss*, 503 N.W.2d 682, 684-86 (Mich. Ct. App. 1993) (concluding, over dissent, that the proposed offensive use of collateral estoppel would violate the defendant’s right to trial by jury); *State v. Scarbrough*, 181 S.W.3d 650, 658-60 (Tenn. 2005) (concluding that the offensive use of collateral estoppel to bar the defendant from contesting his guilt on the underlying felony in his felony-murder trial would violate the defendant’s right to trial by jury under the state constitution). In *Scarbrough*, the defendant was convicted of first degree felony-murder, two counts of theft, and aggravated burglary. The appellate court affirmed the theft and burglary convictions but reversed the murder conviction based on an error in the jury instructions. The government then persuaded the trial court that, in the retrial of the murder charge, defendant should not be permitted to contest that he committed the burglary and thefts. While the trial court ruled that defendant could not contest the final convictions, it was not clear whether the trial court meant that the defendant could not offer evidence that he was not present or that the court would instruct the jury at the end of the case that the defendant had been convicted of the burglary. The appellate courts concluded that neither collateral estoppel nor law of the case doctrine

Those who support the application of collateral estoppel to guilt/innocence issues argue that the resolution of the issue in the initial case fulfills the defendant's rights to trial and to confrontation.²³⁵ However, to treat the earlier trial as providing sufficient protection of the defendant's trial rights in relation to the current charges is problematic. It assumes that, without the defendant's consent, the elements of the charge can be litigated in separate proceedings and tried to separate juries.

The concern with protection of the defendant's right to trial is more pronounced given recent Supreme Court precedent. The Court has strengthened and reemphasized the right to have the jury decide all aspects of the case against the defendant.²³⁶ In a series of cases,

permitted that restriction on the defendant's retrial. *Id.* at 653. The court emphasized that the right to trial included the right to have a single jury determine every necessary fact in a single proceeding. *Id.* at 658.

In *Gutierrez*, the defendant was initially convicted of attempted murder. When the victim eventually died as a result of the shooting, the prosecution charged the defendant with murder, and the trial court accepted the argument that the defendant was barred by his conviction from relitigating the issues of identity and intent. The trial court therefore instructed the jury that those issues had already been determined by a different jury. 29 Cal. Rptr. 2d at 377-78. The court reversed the defendant's murder conviction on the ground that the trial court had violated the defendant's right to a fair trial because it denied the defendant the opportunity to present his defense. *Id.* at 386.

In *Goss*, the defendant was also charged with felony murder. 503 N.W.2d at 683. In his initial trial, the defendant was convicted of the murder charge and of several felonies arising from the same facts. The Michigan Supreme Court reversed the murder conviction but affirmed the other convictions. On retrial, the prosecution, relying on the doctrine of collateral estoppel, moved to have the jury instructed that the defendant had been convicted of the underlying felony, taking that question away from the jury entirely. *Id.* The trial court denied the prosecution's request, and the prosecution appealed. The Michigan Court of Appeals noted the general reluctance to permit offensive use of collateral estoppel in criminal cases and concluded, over dissent, that the proposed offensive use of collateral estoppel would violate the defendant's right to trial by jury. *Id.* at 684-86.

235. See *Gutierrez*, 29 Cal. Rptr. 2d at 387-88 (Woods, J., dissenting) (suggesting that collateral estoppel can be applied where a defendant has already had a fair trial on the issue); *Goss*, 503 N.W.2d at 687-89 (Griffin, J., dissenting) (opining that a first trial and conviction eliminates presumption of innocence); Vestal, *supra* note 18, at 317-18; see also Kennelly, *supra* note 98, at 1382-88 (discussing courts' application of collateral estoppel in alienage status cases and motion to suppress cases).

236. See *United States v. Gaudin*, 515 U.S. 506 (1995). In *Gaudin*, the Court explained:

The more modern authorities the Government cites also do not support its concept of the criminal jury as mere factfinder. Although each contains language discussing the jury's role as factfinder, each also confirms that the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. The point is put with unmistakable clarity in [*Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979)], which involved the constitutionality of statutory inferences and presumptions. Such devices,

the Court has addressed the question of which “sentencing factors” are functionally elements of the offense, requiring them to be determined by a jury by proof beyond a reasonable doubt and limiting the prosecution’s ability to bypass the jury on many sentencing factors.²³⁷ The primary exception to the requirement that a fact which enhances the sentence must be determined by the jury and established by proof beyond a reasonable doubt was defined in *Almendarez-Torres v. United States*, a 5-4 decision that preceded the series of cases on sentencing.²³⁸ In *Almendarez-Torres*, the Court held that Congress’s decision to treat recidivism as a sentencing matter did not violate due process. In demarking this exception, the Court pointed to the traditional consideration of recidivism in sentencing and the lack of unfairness.²³⁹ It is not clear that *Almendarez-Torres* remains good law.²⁴⁰ Even if it is still viable, *Almendarez-Torres* does not support prosecution use of offensive collateral estoppel to establish an element of the offense. It rests on well-established sentencing traditions, whereas offensive use of collateral estoppel to bar relitigation of an element of an offense has never been widely accepted and cannot be characterized as a well-established tradition. Moreover, the use of collateral estoppel to preclude the jury from considering an element of the offense and determining whether the evidence establishes that element beyond a reasonable doubt strikes far closer to the heart of the right to trial by jury than judicial determination of a prior conviction as a sentencing consideration.

Further reason to doubt the constitutionality of offensive collateral estoppel on elements of the offense is found in the Court’s recent Confrontation Clause jurisprudence. Starting with *Crawford*

Allen said, can help

the trier of fact to determine the existence of an element of the crime—that is, an ‘ultimate’ or ‘elemental’ fact—from the existence of one or more ‘evidentiary’ or ‘basic’ facts. . . . Nonetheless, in criminal cases, the ultimate test of any device’s constitutional validity in a given case remains constant: the device must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt.

Id. at 514-15 (citations omitted).

237. See, e.g., *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (holding that the right to a jury trial applied to factors under sentencing guidelines); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact other than a prior conviction that increases penalty for a crime beyond prescribed statutory maximum is subject to trial by jury and proof beyond a reasonable doubt).

238. 523 U.S. 224, 239-42 (1998).

239. *Id.* at 239-47.

240. See *United States v. Adame-Orozco*, 607 F.3d 647, 651 n.6 (10th Cir. 2010) (questioning the continuing viability of *Almendarez-Torres*); *Nichols v. United States*, 563 F.3d 240, 243 n.1 (6th Cir. 2009) (noting a question concerning the status of the *Almendarez-Torres* decision).

v. Washington,²⁴¹ and continuing through a series of decisions,²⁴² the Court has held that the Confrontation Clause requires the witnesses against a defendant to appear and testify at the defendant's trial and that the right to confrontation is not easily overcome by government interests in efficiency, reliable evidence, or maintaining and protecting judicial discretion.²⁴³

An assessment of policy concerns also weighs against applying collateral estoppel offensively on issues of guilt or innocence.²⁴⁴ Collateral estoppel serves to promote consistency as well as to conserve judicial resources by precluding relitigation of a decided issue.²⁴⁵ In criminal cases, however, the weight of the defendant's unique interests tips the balance against permitting offensive use of the doctrine. As the Third Circuit recognized in *United States v. Pelullo*, for example, criminal cases place additional weight on the other side of the balance: "the liberty interest of a criminal defendant takes priority over the usual concerns for efficient judicial administration so often found in civil proceedings."²⁴⁶

241. 541 U.S. 36 (2004).

242. See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716-17 (2011) (quoting *Crawford*, 541 U.S. at 54) (holding that the defendant's Confrontation Clause rights were violated when the government put on surrogate testimony, emphasizing its rigid requirements and stating that there are no "open-ended exceptions from the confrontation requirement to be developed by the courts").

243. See *Crawford*, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

244. See *Simon*, *supra* note 206, at 780-83 (discussing policy considerations). *But see Vestal*, *supra* note 18, at 297 (asserting that "[l]ogic and the wise use of the time of the courts, attorneys, and litigants" support applying issue preclusion against a defendant).

245. See *Gutierrez v. Superior Court*, 29 Cal. Rptr. 2d 376, 386 (Cal. Ct. App. 1994) (recognizing interest in achieving consistency); *State v. Johnson*, 594 A.2d 1288, 1291-92 (N.H. 1991) (discussing interest in conserving resources); *United States v. Arnett*, 327 F.3d 845, 851 (9th Cir. 2003) (referring to government interests); *People v. Page*, 614 N.E.2d 1160, 1167-68 (Ill. 1993) (discussing government interests).

246. 14 F.3d 881, 893 (3d Cir. 1994). In *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008), *rev'd on other grounds sub nom. Bobby v. Bies*, 556 U.S. 825 (2009), the Sixth Circuit summarized the policy issues:

Outside of the double jeopardy context, the doctrine of collateral estoppel exists because of concerns over judicial economy and finality—in most cases, a promptly issued decision, not subject to endless appeals and relitigation, is desirable. In criminal cases, however "finality and conservation of private, public, and judicial resources are lesser values than in civil litigation." This is so, not because economy and finality lose value in the criminal context, but because in a criminal case, the defendant "has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." As the Supreme Court has explained [in *Standefer v. United States*, 447 U.S. 10, 25 (1980)]:

[T]he purpose of a criminal court is not to provide a forum for the

Other courts have recognized additional policy concerns that weigh against allowing offensive collateral estoppel. In *Gutierrez v. Superior Court*, for example, the California court concluded that the interest in maintaining public confidence in the judicial system also outweighed the prosecution's attempt to use offensive collateral estoppel.²⁴⁷ The court further expressed concern that an instruction telling the jurors that another factfinder had resolved certain aspects of the case against the defendant would unfairly prejudice the defendant.²⁴⁸ In *State v. Johnson*, the New Hampshire court cited the interests in accuracy and justice—interests that have special significance in the criminal justice system—and concluded that they outweighed any interests that would be served by collaterally estopping the defendant.²⁴⁹

Moreover, in some instances, the use of offense collateral estoppel would not even serve its intended policy interests. For example, in *State v. Scarbrough*, the Supreme Court of Tennessee concluded that even if the court allowed offensive collateral estoppel, the prosecution would still have to present evidence of the felony to establish it as an element in a felony-murder case.²⁵⁰ Thus, use of the doctrine would not result in increased efficiency or conservation of judicial resources.²⁵¹

In sum, both constitutional and policy concerns argue against permitting offensive use of collateral estoppel against a criminal defendant on issues of guilt or innocence. Nevertheless, prosecutors continue to invoke collateral estoppel at trial, persuading the courts to bar the defendant from litigating at trial issues resolved in earlier proceedings. The courts should acknowledge those concerns and hold clearly that collateral estoppel cannot be used offensively on issues of guilt or innocence.

ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases. . . .

Because of a criminal defendant's "interest of transcending value" in vindicating his rights in a criminal case, we join the Third, Ninth, Tenth and Eleventh Circuits in holding that, in a criminal case, collateral estoppel may only be invoked by the accused. Collateral estoppel's concern with swift, final adjudication cannot overcome a criminal defendant's interest in his own life and liberty.

Id. at 339-40 (citations omitted).

247. 29 Cal. Rptr. 2d at 386.

248. *Id.* at 386-87.

249. 594 A.2d at 1292.

250. 181 S.W.3d 650, 658 (Tenn. 2005).

251. *See id.*

2. Proving the Prior Conviction

Some courts imply that the prosecution may introduce the prior conviction even though they are not permitted to implement collateral estoppel through an instruction to the jury.²⁵² Other courts assume that introducing the prior conviction is the functional equivalent of collateral estoppel and is consequently prohibited.²⁵³ The latter view should prevail.

Unlike collateral estoppel, which takes the issue away from the jury, introducing the prior conviction leaves the jury free to accept or reject the evidence. Nevertheless, it is unlikely that the jury will disregard a prior conviction that resolves an issue central to the case. Courts should therefore assess prior conviction evidence with caution and should not generally allow the prosecution to accomplish the goal of estoppel indirectly by introducing the prior conviction as evidence establishing an element of the offense.²⁵⁴

The rules of evidence do not restrict use of the defendant's prior felony convictions.²⁵⁵ Provided that the conviction is for a felony and does not rest on a plea of *nolo contendere*, the proof of the prior conviction is admissible unless the Constitution prohibits it or the court determines that the evidence creates such a risk of unfair prejudice to the defendant that it should be excluded.²⁵⁶ In assessing

252. See, e.g., *United States v. Pelullo*, 14 F.3d 881, 887-88 (3d Cir. 1994) (differentiating between the introduction of a prior conviction and the application of collateral estoppel); *Scarborough*, 181 S.W.3d at 659-60 (holding that prosecution could introduce evidence of the defendant's conviction of the underlying felony in his felony murder trial providing risk of unfair prejudice does not substantially outweigh probative value). See also *Vestal*, *Issue Preclusion*, *supra* note 18, at 281 n.1 (distinguishing issue preclusion from proof of a prior conviction).

253. See, e.g., *State v. Ingenito*, 432 A.2d 912, 914-15 (N.J. 1981) (condemning the use of proof of prior conviction as an improper offensive collateral estoppel violating the defendant's right to trial by jury); see also *United States v. Bejar-Matrecios*, 618 F.2d 81, 83 (9th Cir. 1980) (assuming that the introduction of a prior conviction would normally be permitted as collateral estoppel). The conviction discussed in *Bejar-Matrecios* would not have been admissible under the rules of evidence because it was a misdemeanor conviction. *Id.*; see FED. R. EVID. 609(a)(1).

254. If a prior conviction is admitted, the trial court should explain to the jury its role in the case. In *United States v. Bejar-Matrecios*, for example, the Ninth Circuit held that the particular use of the prior conviction was unfairly prejudicial because the trial court did not explain its evidentiary role, and the conviction was cumulative evidence in the case. 618 F.2d at 84.

255. See FED. R. EVID. 803(22) ("Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.")

256. See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

admissibility, the trial court may consider how difficult it would be for the prosecution to establish the underlying facts instead of relying on the conviction.²⁵⁷ The court should also consider that proving that the defendant was convicted of a related offense may actually inject more prejudice into the case than the application of collateral estoppel, which merely removes an issue from their consideration. Proof of the prior conviction tarnishes the defendant's character by informing the jurors of the conviction.²⁵⁸

In *United States v. Tocco*, the Sixth Circuit permitted the prosecution to introduce Tocco's codefendants' prior convictions, over Tocco's objection, to establish the requisite predicate acts in the trial on racketeering charges.²⁵⁹ The court focused on two aspects of the case to support its conclusion that the codefendant's convictions were properly admitted. First, the defendant was free to raise a reasonable doubt about whether he participated in the criminal conduct; second, the court did not give a collateral estoppel instruction taking the issue away from the jury.²⁶⁰ Of course, since the jury learned only that Tocco's codefendants had been convicted, the likelihood of prejudice flowing to Tocco was less than when the jury learns that the defendant herself has been convicted. The conviction should therefore have been excluded.

IV. APPLYING THE DOCTRINES AGAINST THIRD PARTIES

In some instances, the prosecution seeks to achieve consistency among defendants by applying a consistency-promoting doctrine to bar the defendant from disputing or relitigating an issue resolved in a codefendant's case. However, none of the consistency-promoting

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

257. See *Pelullo*, 14 F.3d at 888-89 (noting that the district court failed to consider the burden on the prosecution to prove facts without the use of prior conviction evidence).

258. See MCCORMICK ON EVIDENCE § 190 (Kenneth S. Broun ed., 6th ed. 2006) (stating that the prosecution is not permitted to introduce character evidence of other criminal acts unless the prosecution has a purpose other than to suggest that such former criminal acts indicate defendant's guilt in the case at issue because introduction of such evidence leads to prejudice, confusion, and time-consumption).

259. 200 F.3d 401, 417-18 (6th Cir. 2000). The court summarized the procedural posture of the case as follows:

At trial, the district court allowed the government to admit into evidence the certified convictions against certain of Tocco's co-defendants. Tocco generally objected to the admission of that evidence, but at no time did he specifically complain that this was an improper use of offensive collateral estoppel. Because we find that the admission of those convictions was permissible, we will assume for purposes of our analysis that the issue was properly preserved for review.

Id. at 417.

260. *Id.* at 417-18.

doctrines supports advancing the preference for reaching the same result by enforcing the outcome in a codefendant's case against a defendant who did not participate in that proceeding.²⁶¹

There seems to be little debate that collateral estoppel cannot be applied against a criminal defendant who did not participate in the first proceeding.²⁶² Indeed, the courts do not apply collateral estoppel against a defendant who was not a party to the prior litigation on suppression issues. For example, in *Commonwealth v. DeJesus*, the prosecution sought to enforce a denial of a motion to suppress not only against the two defendants who had litigated the initial motion to suppress but also against their codefendants.²⁶³ The Massachusetts court held unequivocally that collateral estoppel would not apply against the codefendants because they had not participated in the earlier case.²⁶⁴

Law of the case should likewise play no role against third parties. In *United States v. Rosen*, the First Circuit applied law of the case against the defendant on the basis of an appellate ruling in a codefendant's appeal. Rosen and his codefendant had participated in the same hearing on the motion to suppress.²⁶⁵ The codefendant had then appealed, challenging the validity of the search, and the First Circuit rejected his argument and upheld the search.²⁶⁶ When Rosen then raised the identical issue in his appeal, the court stated that the ruling in the codefendant's case was law of the case, binding on Rosen.²⁶⁷ Although the outcome was correct, law of the case was the wrong doctrine to invoke. The doctrine should apply only against the defendant who participated in the proceeding in which the applicable

261. Even in civil cases, due process restricts the use of an earlier resolution against a defendant who was not a party to the earlier case. See *Taylor v. Sturgell*, 553 U.S. 880, 884-85 (2008) (stating the general principle and rejecting use of "virtual representation" to extend preclusion to a party not personally involved in the earlier case). A related question concerns whether the defendant is able to invoke issue preclusion against the prosecution based on resolution of an issue in a case not involving the defendant; see, e.g., *State v. Lundy*, 829 S.W.2d 54, 55-56 (Mo. Ct. App. 1992) (rejecting the argument that a favorable ruling on a motion to suppress in a codefendant's case could be invoked to bar the prosecution from relitigating the issue in the defendant's case). That question is beyond the scope of this article.

262. See, e.g., *People v. Superior Court*, 224 P.3d 86, 95 (Cal. 2010) (stating as a given that "no criminal defendant can be bound by an *adverse* factual finding in a trial in which that defendant did not participate"); Vestal, *supra* note 18, at 288 (noting that "[t]he person to be bound must have actually litigated the issue in the first suit," while discussing the requirements for collateral estoppel).

263. Nos. 104104, 104107, 104110, 104105, 104108, 104117, 104106, 104109, 104118, 1998 WL 181658, at *1 (Mass. Super. Ct. Apr. 14, 1998).

264. *Id.* at *3.

265. 929 F.2d 839, 842 (1st Cir. 1991).

266. *Id.*

267. *Id.* at 842 n.5.

ruling was developed and not against someone, like Rosen, who played no role. Because Rosen had participated in the suppression hearing, the facts were identical, but Rosen was entitled to seek review of the ruling against him. The court could have resolved it against him on the basis of stare decisis.²⁶⁸ The doctrine promotes consistency across cases rather than within single or related cases, directing the courts to arrive at the same legal outcome on identical facts.

However, stare decisis should be used extremely cautiously to bar litigation by a defendant who was not involved in the earlier litigation. Although stare decisis acts to make judicial decisions binding on unrelated third parties who tackle the same issues,²⁶⁹ applying the doctrine with too much force to bind a defendant who did not participate in the earlier litigation may violate due process.²⁷⁰ The circumstances of different defendants may be sufficiently dissimilar to lead to different results, even when they are charged for the same course of criminal conduct.²⁷¹ While stare decisis establishes a preference for applying consistent legal principles, and therefore reaching the same result on the same facts, the doctrine should not foreclose the third party from arguing that the specific facts call for a different result. Nor should the doctrine be read to preclude the third party from arguing that the decision in the unrelated case was incorrect.²⁷²

In some cases, stare decisis has been applied to make the result as to one defendant binding on a codefendant. In *United States v. Cardales-Luna*, for example, the First Circuit applied stare decisis to support its rejection of the defendant's argument that the evidence was insufficient to convict him.²⁷³ The case arose from the interdiction of a ship from Columbia; when the ship was seized, the authorities embarked on a detailed search. On the sixth day of the

268. Law of the circuit might also support the ruling. Law of the circuit refers to the practice of subsequent panel judges following the decision of previous panel judges in that circuit. Under law of the circuit "only the en banc court can overrule circuit precedent established by a panel decision." 18B WRIGHT, *supra* note 2, § 4478.2, at 727. Further consideration of law of the circuit is beyond the scope of the article.

269. See Minzner, *supra* note 1, at 611-12 (discussing the similarity of the effect stare decisis has on third parties with that of the law of the case or issue preclusion).

270. *Id.* (discussing due process implications in civil cases); Barrett, *supra* note 85, at 1026-28 (arguing that application of stare decisis in some civil cases may violate due process).

271. In *Standefer v. United States*, 447 U.S. 10, 21-25 (1980), the Court recognized that the admissibility of evidence might vary among codefendants, thus producing different results.

272. See Barrett, *supra* note 85, at 1020-26 (discussing the practice of distinguishing cases to avoid stare decisis impact). Barrett also notes that some courts treat stare decisis as foreclosing consideration of contrary arguments. *Id.* at 1017-19.

273. 632 F.3d 731 (1st Cir. 2011).

search, they discovered large quantities of narcotics hidden in a secret compartment.²⁷⁴ Eight crew members were charged with various offenses, all of which required proof that they knew the drugs were on the ship. Cardales-Luna's codefendants were tried first. Three were acquitted, but the other four were convicted. One crewmember challenged the sufficiency of the evidence, but the First Circuit rejected the challenge.²⁷⁵ Cardales-Luna was then tried and convicted. He too appealed on the ground that there was insufficient evidence.²⁷⁶ The court applied *stare decisis* and rejected his appeal. Even though the government conceded that the prior decision lacked *stare decisis* effect, the court rejected the argument that *stare decisis* should not apply to sufficiency arguments and applied the doctrine, concluding that it should follow the prior determination of sufficiency as a matter of law.²⁷⁷

The First Circuit gave *stare decisis* too great a role in *Cardales-Luna*. The doctrine should play a limited role in successive sufficiency challenges even in the same underlying case. The court pointed to four broad factual propositions that the earlier decision held were sufficient to establish knowing possession.²⁷⁸ However, *stare decisis* would require the same legal conclusion that the evidence was sufficient only if the evidence admitted against Cardales-Luna was so similar that it supported those essential findings. Before concluding that the evidence in the successive trial was sufficient, the court should have examined the evidence admitted in the second trial as carefully as it examined the evidence in the first trial.²⁷⁹ In *Cardales-Luna*, for example, one cause for concern was that the first trial lasted six days, while the second only lasted one day. To resolve the sufficiency issue based on the relationship between the two trials, the court should have engaged in a detailed comparison of the evidence implicating the crew members in the first trial and Cardales-Luna in his separate trial, just as it would if the cases were unrelated but presented very similar facts. The decision in his codefendants' case should be given *stare decisis* effect only if it addressed identical legal claims resolved on

274. See *United States v. Angulo-Hernández*, 565 F.3d 2, 5-6 (1st Cir. 2009) (detailing facts relevant in *Cardales-Luna*).

275. *Id.* at 9.

276. *Cardales-Luna*, 632 F.3d at 732-33.

277. *Id.* at 733-36.

278. *Id.* at 732-33.

279. See, e.g., *United States v. Diaz-Bastardo*, 929 F.2d 798, 799-800 (1st Cir. 1991) (comparing relevant evidence adduced in successive cases); see also *United States v. Willoughby*, 27 F.3d 263, 267 (7th Cir. 1994) ("An affirmance [when the defendant challenges the sufficiency of the evidence to support a conviction] means no more than that from an appellate perspective the fact finder has performed its duties satisfactorily; following its mandate, it arrived at a rational result.").

sufficiently similar facts and not, as the court seemed to suggest, simply because it arose out of the same underlying case.²⁸⁰

Similarly, in *United States v. Reveron Martinez*, the First Circuit applied stare decisis without adequate factual evaluation simply because the cases were related.²⁸¹ In *Reveron Martinez*, the defendant complained that pretrial publicity deprived him of a fair trial. His nine codefendants had been tried earlier and their argument based on pretrial publicity had been rejected by the court of appeals. The First Circuit declined to address the defendant's prejudicial publicity complaint, stating that the earlier decision was stare decisis.²⁸² The court emphasized the need for uniform decisions within the circuit and dismissed the possibility that the difference in the composition of the jury called for reconsideration of the issue.²⁸³ This use of stare decisis, driven by the desire to achieve consistent results, gives unusual effect to the doctrine. Instead of simply assuming that the result must be the same for separately-tried codefendants, the court should have addressed the factual similarities and dissimilarities as if they were unrelated cases. Although the similarities will often be sufficient to lead to an identical result under the doctrine of stare decisis, the court should not assume so.

It is also inappropriate to apply stare decisis to treat a determination on a question other than guilt arrived at in a codefendant's proceeding as binding. In *United States v. Youngpeter*, the sentencing court relied on a finding concerning the nature of the drug involved, a finding arrived at in a codefendant's hearing in which the defendant did not participate.²⁸⁴ The government relied on

280. See *Cardales-Luna*, 632 F.3d at 736 (finding that the record did "no more than replicate the same facts that were before us in the previous appeal" (internal quotations omitted)).

281. 836 F.2d 684, 687 (1st Cir. 1988).

282. The court explained:

In *Moreno Morales*, we ruled that the pretrial publicity surrounding these events, though extensive, did not deprive the persons accused of their right to a fair trial. Given the imbrication between appellant's claim and those earlier advanced by his codefendants, the doctrine of *stare decisis* bars relitigation of that issue. The judgment of the majority of the *Moreno Morales* panel on this precise point has become precedent, binding in future cases before us. If order and fairness are to attend the legal process, that point can be resolved no differently for Reveron Martinez than for his identically situated codefendants.

Id. (internal citations omitted).

283. See *id.* ("Uniformity of decisions within a multi-panel circuit can only be achieved by strict adherence to prior circuit precedent." (citing *Lacy v. Gardino*, 791 F.2d 980, 985 (1st Cir. 1986))).

284. 145 F.3d 1347, at *3 (10th Cir. 1998) (appearing in the "Table of Decisions Without Reported Opinions" in the Federal Reporter).

stare decisis to apply that finding against the defendant. The Tenth Circuit appropriately limited the effect of the doctrine. The court rejected the stare decisis argument and held that the defendant must have an opportunity to contest the issue, concluding that to hold otherwise would deprive him of his right to be present at a critical stage of the trial.²⁸⁵

V. CONCLUSION

Four consistency-promoting doctrines play a role in criminal cases: collateral estoppel, res judicata, law of the case, and stare decisis. While these doctrines increase consistency, enhance efficiency, and conserve scarce resources, allowing the prosecution to employ them offensively against a criminal defendant may compromise the defendant's rights and the interest in justice. As a result, offensive use should be permitted with caution and only after careful consideration.

Although some matters, such as rulings on motions to suppress, are often appropriate for offensive use of these doctrines, courts should nevertheless assess concerns of fairness before applying the doctrines against the defendant. Other matters are almost never appropriate subjects for offensive use of these doctrines. For example, evidentiary issues are typically dependent upon the factual development in the case and entail the exercise of judicial discretion. They should only rarely be subject to the limitations of law of the case or collateral estoppel.

Most importantly, courts should never apply consistency-promoting doctrines to bar the defendant from litigating an element of the offense, even if that element was arguably resolved by an earlier conviction. Instead, the prosecution should be required in every case to prove all elements of the crime. To bar the defendant from litigating an element of the offense would be inconsistent with the constitutional right to trial by jury. The policy concerns of consistency and conservation of judicial resources are outweighed by the defendant's interest in justice. Further, courts should generally not admit the prior conviction into evidence to establish the element of the offense, because the evidence is likely to irreparably prejudice the jury.

Courts should also decline to apply these consistency-promoting doctrines against third parties to foreclose them from litigating an issue resolved in a proceeding in which they did not participate. Only stare decisis plays a role against third parties, making adverse precedent binding on a defendant in a related case. But the third party can demonstrate that the facts call for a different result or

285. *Id.* at *4.

attempt to persuade the court that the earlier decision is incorrect. Stare decisis does not foreclose further litigation.

Currently, state and federal courts vary in their application of these doctrines: some courts apply them when they should not, and others fail to apply them when they should. By focusing on and weighing all the relevant interests, courts will more accurately define the appropriate offensive use of these doctrines.