

Criminal Law—Jury’s Silence on Theory of First-Degree Murder Not an Acquittal for Double Jeopardy Purposes—*Commonwealth v. Carlino*, 865 N.E.2d 767 (Mass. 2007)

Prohibitions against double jeopardy, whether based on the Double Jeopardy Clause of the United States Constitution or the right provided by Massachusetts law, prevent the government from subjecting individuals to the hazards of standing trial more than once for the same offense.¹ Generally, courts have not interpreted a jury’s silence on one charge as an implied acquittal for purposes of double jeopardy, unless the jury’s guilty verdict on another charge logically excludes guilt of the charge on which the jury remained silent.² In *Commonwealth v. Carlino*,³ the Massachusetts Supreme Judicial Court (SJC) considered whether a jury’s silence on one of three alternate theories of first-degree murder at the defendant’s first trial prevented the Commonwealth from retrying the defendant on that same theory.⁴ The SJC held that the jury’s silence on the felony-murder theory in Thomas Carlino’s first trial was not an acquittal for double jeopardy purposes and, thus, did not prevent retrial on that theory.⁵

In 1995, the Commonwealth tried Thomas Carlino for first-degree murder on three theories: premeditation, extreme atrocity or cruelty, and felony-murder.⁶ At the trial’s conclusion, the judge gave the jury a verdict slip with lines for “Not Guilty” and “Guilty of Murder in the First Degree,” as well as lines for each of the three theories of first-degree murder under the line for guilty.⁷ The judge instructed the jury that if they found the defendant guilty of

1. See *infra* notes 15-18 and accompanying text (detailing sources of prohibitions against double jeopardy, their rationales, and how courts apply them).

2. See *infra* note 26 and accompanying text (discussing cases considering effects of jury’s silence on prohibition against double jeopardy).

3. 865 N.E.2d 767 (Mass. 2007).

4. See *id.* at 770 (summarizing procedural history and Carlino’s double jeopardy argument on appeal). Carlino also raised two other issues on appeal: first, that the trial judge erred in failing to give a jury instruction on the castle law, and second, that the SJC should reduce the conviction pursuant to its statutory authority. *Id.* The SJC affirmed the trial court on the failure to issue the castle law instruction and declined to reduce Carlino’s conviction. *Id.*

5. See *id.* at 775 (reasoning court cannot discern jury’s intent to acquit or convict from jury’s silence).

6. See *id.* at 769-70 (describing Commonwealth’s proffered theories in Carlino’s first trial). The underlying felony for felony murder was unlawful possession of a sawed-off shotgun. *Id.* at 770 n.2. See generally *Commonwealth v. Carlino*, 710 N.E.2d 967 (Mass. 1999) (summarizing facts and proceedings in Carlino’s first murder trial).

7. 865 N.E.2d at 773, 777 app. (reproducing verdict slip from first trial in appendix of decision). The verdict slip also has lines for “Guilty of Murder in the Second Degree,” “Guilty of Voluntary Manslaughter,” “Guilty of Involuntary Manslaughter,” and lines where the jury could indicate whether Carlino was guilty or not guilty of unlawfully possessing a sawed-off shotgun. *Id.* at 777 app.

first-degree murder they must “answer the questions . . . as to under which theory or theories, whether it be one, two, or all three.”⁸ The jury convicted Carlino of murder in the first degree on both the premeditation and extreme atrocity or cruelty theories, placing an “X” on the line next to both, but the jury placed no mark on the line for felony-murder.⁹ Upon appeal, the SJC reversed Carlino’s first-degree murder conviction and remanded for a new trial because of erroneous or misleading jury instructions on provocation, self-defense, and defense of another.¹⁰

In Carlino’s second trial in 2001, the trial judge initially ruled that double jeopardy principles barred retrial on the felony-murder theory but reversed herself the following day.¹¹ At the close of evidence, the judge instructed the jury on premeditation, extreme atrocity or cruelty, and felony-murder, and the jury convicted Carlino of first-degree murder on all three theories.¹² Once again, Carlino appealed his conviction to the SJC, and argued the prohibition against double jeopardy prevented the second jury from considering the felony-murder theory after the first jury failed to convict him on that theory.¹³ The SJC held the ban on double jeopardy did not prevent the second jury from convicting on felony-murder because the jury’s failure to “check the felony-murder box” was neither a conviction nor an acquittal for double jeopardy purposes.¹⁴

The Fifth Amendment of the United States Constitution prohibits double jeopardy and applies to the states through the Fourteenth Amendment.¹⁵ Both

8. *Id.* at 773 n.17 (quoting trial judge’s jury instructions on completing verdict slip).

9. *Id.* at 773 (noting verdict slip did not indicate conviction or acquittal on felony-murder theory). The felony-murder line reads “Murder in the commission or attempted commission of a crime punishable with imprisonment for life.” *Id.* at 777 app. The jury did find Carlino guilty of the underlying felony of unlawful possession of a sawed-off shotgun. *Id.* at 770 n.1. Under Massachusetts law, possession of a sawed-off shotgun is punishable by life imprisonment. *See* MASS. GEN. LAWS ch. 269, § 10(c) (2000).

10. *Commonwealth v. Carlino*, 710 N.E.2d 967, 968-69 (Mass. 1999) (summarizing SJC’s reasons for reversing Carlino’s conviction and remanding for new trial); *see* 865 N.E.2d at 770 (noting court set aside Carlino’s murder conviction after first trial). The court did not vacate the conviction of unlawfully possessing a sawed-off shotgun. 865 N.E.2d at 770 n.3.

11. *See* Brief and Appendix for the Defendant/Appellant on Appeal from the Bristol County Superior Court at 30-32, *Commonwealth v. Carlino*, 865 N.E.2d 767 (Mass. 2007) (No. SJC-09549), 2006 WL 3830780 [hereinafter *Carlino’s Brief*] (arguing judge erroneously instructed jury on felony-murder theory and noting court’s reversal). According to Carlino’s brief to the SJC, the trial judge relied on *Green v. United States*, 355 U.S. 184 (1957), in her initial ruling and *Commonwealth v. Nardone*, 564 N.E.2d 359 (Mass. 1989), when she reversed herself. *See* *Carlino’s Brief*, *supra*, at 32-33, (describing judge’s reasoning in barring, and subsequently allowing, jury to consider felony-murder theory).

12. 865 N.E.2d at 770, 772 (describing judge’s jury instructions in second trial and conviction).

13. *See id.* at 769-70 (summarizing case’s procedural history prior to second appeal); *Carlino’s Brief*, *supra* note 11, at 30-34 (arguing failure to convict Carlino of felony-murder equivalent to acquittal for double jeopardy purposes).

14. *See* 865 N.E.2d at 775 (determining effect of first jury’s silence on theory of murder); *see also id.* at 772-775 (addressing and rejecting defendant’s argument that jury silence equivalent to acquittal in double jeopardy cases).

15. *See* U.S. CONST. amend. V (stating government cannot twice place person in jeopardy for same

Massachusetts statutory and case law provide prohibitions on double jeopardy independent of the federal prohibition.¹⁶ The Double Jeopardy Clause prevents the government from subjecting a defendant to the hazards of trial, including possible punishment, more than once for the same offense.¹⁷ The prohibition prevents three specific actions: a prosecution for the same offense after acquittal, a prosecution for the same offense after conviction, and multiple punishments for the same offense.¹⁸ Double jeopardy principles, however, do not necessarily bar retrial on the same offense following a successful appeal.¹⁹ Courts balance double jeopardy concerns against society's countervailing interest in bringing criminals to justice.²⁰

offense); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (incorporating Double Jeopardy Clause against states and characterizing clause as "fundamental ideal" of "constitutional heritage").

16. See MASS. GEN. LAWS ch. 263, § 7 (2000) (stating Commonwealth cannot bring charges for crime after defendant's acquittal on facts and merits); *Luk v. Commonwealth*, 658 N.E.2d 664, 666 n.3 (Mass. 1995) (recognizing double jeopardy ban as part of Massachusetts law, notwithstanding omission in Declaration of Rights); cf. MASS. CONST. pt. 1, art. I-XXX (neglecting to expressly mention prohibition against double jeopardy).

17. *Green v. United States*, 355 U.S. 184, 187 (1957) (examining history of Double Jeopardy Clause and its rationale). The Court held in *Green* that permitting the government to repeatedly try a defendant for the same crime would "compel[] him to live in a continuing state of anxiety and insecurity, as well as enhanc[e] the possibility that even though innocent he may be found guilty." *Id.* at 187-88; see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 116 (1998) (discussing rationale of Double Jeopardy Clause).

If the government won a fair and suitably error-free criminal trial, it would not give the defendant a right to ignore the verdict and demand a new trial on a clean slate. Why should a defendant be placed in a lesser position if *he* won? Hence the double-jeopardy clause banning any government effort to say "heads we win, tails let's play again until you lose."

AMAR, *supra*, at 116 (emphasis and quotation in original).

18. See *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-07 (1984) (listing three separate guarantees provided by Double Jeopardy Clause); see also *Thirty-Fourth Annual Review of Criminal Procedure, II. Preliminary Proceeding: Double Jeopardy*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 411, 412 & n.1391 (2005) (listing Supreme Court cases discussing abuses Double Jeopardy Clause prevents). Because different types of pro-defense resolutions to a case fall within the Supreme Court's definition of an "acquittal," the Double Jeopardy Clause bars retrial for all of them. See 5 WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 25.3 (2d ed. 2007) (summarizing arguments against attaching double jeopardy prohibition to acquittals resulting from trial errors benefiting defendants); Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?*, 27 ARIZ. ST. L.J. 953, 970 (1995) (stressing importance of determining whether particular disposition equals acquittal).

19. See *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984) (stating Double Jeopardy Clause generally allows retrial after reversal); *United States v. Tateo*, 377 U.S. 463, 465 (1964) (characterizing retrial after reversal of conviction as well-established part of constitutional jurisprudence); *Green v. United States*, 355 U.S. 184, 189 (1957) (discussing various rationales for allowing retrial after appellate reversal). Even though retrial after a reversed conviction may cause the defendant "emotional and pecuniary injury," courts will only prevent such a retrial if there exists insufficient evidence to support a conviction. See Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 732 (1981) (observing risk of unjust conviction properly prevents retrial after reversal for insufficient evidence).

20. See *United States v. Jorn*, 400 U.S. 470, 483-84 (1971) (concluding government's interest in punishing criminals allows retrial after reversed conviction); *United States v. Tateo*, 377 U.S. 463, 466 (1964) (reasoning reversible error not sufficient to overcome societal interest in punishment and prevent retrial); *Green*

When a trial ends without an acquittal or a conviction—as with a mistrial or hung jury—determining whether the double jeopardy prohibition applies becomes complicated.²¹ In *Green v. United States*,²² the Supreme Court held that a jury’s silence on first-degree murder and conviction on second-degree murder implied an acquittal on first-degree murder preventing further prosecution on that charge.²³ Seven years later, in *United States v. Tateo*,²⁴ the Supreme Court noted that *Green*’s holding applies only to cases where the jury convicts the defendant of a lesser included offense.²⁵ Courts generally do not interpret a jury’s silence as an implied acquittal unless a guilty verdict on one charge, such as a lesser included offense, logically excludes guilt on another.²⁶ When a jury convicts on one theory and remains silent on an alternate theory, some courts have held silence does not prevent retrial on the alternate theory.²⁷

v. *United States*, 355 U.S. 184, 218-19 (1957) (Frankfurter, J., dissenting) (discussing Bill of Rights drafters’ intention to balance double jeopardy protections against further legal appeals); *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1050 (2d Cir. 1972) (arguing fairness to public demands retrial after reversal for erroneous admission of evidence). “The government interest in sound administration of justice would be undermined if an appellate reversal always terminated the prosecution; that interest is so significant that it outweighs any double jeopardy interest that the defendant can advance.” Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1255 (2004); see also Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1274 (1964) (arguing society’s interest in punishing guilty defendants important countervailing consideration to double jeopardy).

21. See JOSEPH R. NOLAN & LAURIE J. SARTORIO, 32 MASS. PRAC., CRIMINAL LAW § 692 (3d. ed. 2007) (discussing various double jeopardy ramifications for trials ending in mistrials, hung juries, and pretrial dismissals).

22. 355 U.S. 184 (1957).

23. *Green v. United States*, 355 U.S. 184, 189-91 (1957) (concluding jury’s silence after full opportunity to return guilty verdict constituted acquittal on first-degree murder).

24. 377 U.S. 463 (1964).

25. *United States v. Tateo*, 377 U.S. 463, 465 n.1 (1964) (explaining under *Green* double jeopardy attaches only to greater included offenses with no guilty finding).

26. Compare *Cichos v. Indiana*, 385 U.S. 76, 80 (1966) (applying Indiana statutory and common law in reasoning jury’s silence not an acquittal), and *Commonwealth v. Nardone*, 546 N.E.2d 359, 366 (Mass. 1989) (reasoning assault with intent to kill conviction not assault with intent to murder acquittal), with *Commonwealth v. Preston*, 471 N.E.2d 340, 345 n.8 (Mass. 1984) (noting conviction of second-degree murder logically implied acquittal of first-degree murder). Where the judge instructed the jury to check only one of three boxes on the verdict slip—guilty as principal, guilty under joint venture theory, or not guilty—and the jury convicted the defendant as a joint venturer, double jeopardy prevented the Commonwealth from retrying the defendant as a principal. *Rendon-Alvarez v. Commonwealth*, 768 N.E.2d 1081, 1083-85 (Mass. 2002).

27. See *United States v. Ham*, 58 F.3d 78, 85-86 (4th Cir. 1995) (holding jury’s failure to check predicate act on verdict form did not imply acquittal); *United States v. Wood*, 958 F.2d 963, 972 (10th Cir. 1992) (determining jury’s silence on equivalent counts of indictment did not prevent retrial on those counts); *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1045 n.7 (2d Cir. 1972) (noting silence of jury not equivalent to acquittal); *Beebe v. Nelson*, 37 F. Supp. 2d 1304, 1308 (D. Kan. 1999) (deciding silence on alternate first-degree murder theory did not imply acquittal barring further prosecution); *State v. Pexa*, 574 N.W.2d 344, 347 (Iowa 1998) (asserting failure to consider offense’s alternative definition not acquittal for double jeopardy purposes); cf. *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1053 (2d Cir. 1972) (Mansfield, J., concurring) (arguing defendant’s strategy at first trial precluded invocation of double jeopardy upon retrial). Judge Mansfield wrote that the defendant’s consent to discharge the jury after it remained silent on one theory of first-degree murder “was essentially the same as that given upon the declaration of a mistrial or the discharge of a jury prior to verdict, both of which represent exceptions to the application of the constitutional guarantee

Conversely, other courts have held a jury's silence on a certain theory prevents retrial on that theory.²⁸

Recently, in *Commonwealth v. Crawford*,²⁹ the SJC briefly noted that the jury's rejection of a particular theory of first-degree murder implied an acquittal on that theory.³⁰ The court, however, relegated discussion of this issue to a footnote and did not address the distinction between a jury's rejection of a theory of first-degree murder through silence or an affirmative indication on a verdict slip.³¹ There is little Massachusetts authority on this issue, but the SJC did explain, in *Edgerton v. Commonwealth*,³² a nineteenth century case, that a jury's failure to decide one part of an indictment prevented further proceedings upon that matter.³³ By contrast, in *Commonwealth v. Call*,³⁴ decided two decades before *Edgerton*, the SJC contended that the government must retry a defendant when the jury's verdict neither affirms nor denies the allegations in the indictment.³⁵ In 2002, in *Commonwealth v. Gonzalez*,³⁶ the SJC affirmed *Call*'s reasoning, explaining that "for double jeopardy purposes," a "true acquittal requires a verdict on 'the facts and merits.'"³⁷

In *Commonwealth v. Carlino*, the SJC considered whether double jeopardy

against double jeopardy." *Id.*

28. See *Terry v. Potter*, 111 F.3d 454, 458 (6th Cir. 1997) (reasoning jury's failure to convict on murder theory in first trial barred retrial of theory); *State v. Hescocock*, 989 P.2d 1251, 1257 (Wash. Ct. App. 1999) (agreeing with other courts ruling silence on counts bars further prosecution on those counts).

29. 706 N.E.2d 289 (Mass. 1999).

30. See *Commonwealth v. Crawford*, 706 N.E.2d 289, 296 n.18 (Mass. 1999) (relegating discussion to footnote on last page of opinion). In some cases, it remains unclear whether a rejection of a murder theory, such as in *Crawford*, derives from the jury's affirmative vote or merely the jury's silence. See *Commonwealth v. Crawford*, 706 N.E.2d 289, 290 n.1, 296 n.18 (Mass. 1999) (concluding jury rejected deliberate premeditation murder theory but omitting whether rejection resulted from jury's silence); see also *Commonwealth v. Almonte*, 829 N.E.2d 1094, 1096 n.1 (Mass. 2005) (noting jury's rejection of felony-murder theory without describing jury's method of communicating rejection); *Commonwealth v. DePace*, 742 N.E.2d 1054, 1061 n.5 (Mass. 2001) (noting jury's rejection of deliberate premeditation theory without detailing method of rejection communication).

31. See *Commonwealth v. Crawford*, 706 N.E.2d 289, 296 n.18 (Mass. 1999) (commenting briefly on double jeopardy ramifications of jury rejecting theory of first-degree murder).

32. 87 Mass. (5 Allen) 514 (1862).

33. *Edgerton v. Commonwealth*, 87 Mass. (5 Allen) 514, 515 (1862) (holding jury's silence on particular count either acquittal or discontinuance of part of indictment); see also *Commonwealth v. Foster*, 122 Mass. 317, 322-23 (1877) (applying *Edgerton*'s holding to preclude retrial on charge where court rendered judgment).

34. 38 Mass. (21 Pick.) 509 (1839).

35. See *Commonwealth v. Call*, 38 Mass. (21 Pick.) 509, 514-15 (1839) (holding jury's verdict defective because it did not determine truthfulness of indictment's allegations). The *Call* jury rendered a special verdict, finding the defendant guilty, but on a different charge than the grand jury alleged in the indictment. *Id.* at 509. The SJC held a new trial was the appropriate remedy, refusing to interpret the verdict as an acquittal or guilty verdict. *Id.*

36. 771 N.E.2d 134 (Mass. 2002).

37. *Commonwealth v. Gonzalez*, 771 N.E.2d 134, 139-40 (Mass. 2002) (quoting MASS. GEN. LAWS ch. 263, § 7 (2000)) (summarizing effect given under Massachusetts law to jury's silence on whether double jeopardy attaches). The entire quotation of the statute read, "A person shall not be held to answer on a second indictment or complaint for a crime of which he has been acquitted upon the facts and merits . . ." MASS. GEN. LAWS ch. 263, § 7 (2000).

attaches to a jury's decision on a first-degree murder theory when the jury did not mark the appropriate line on the verdict slip.³⁸ The court reasoned that the jury's silence had three possible meanings: an acquittal on the theory, the inability to reach a unanimous verdict on it, or a failure to deliberate on the theory altogether.³⁹ The court further reasoned the convictions on the premeditation and extreme atrocity or cruelty theories did not preclude a conclusion that the jury acquitted on the felony-murder theory.⁴⁰ After a brief analysis of the limited Massachusetts authority on the issue, the court concluded that the first jury's silence could not operate as an acquittal for double jeopardy purposes.⁴¹ Thus, as there was no double jeopardy issue, the court affirmed the second jury's conviction on the felony-murder theory.⁴² Furthermore, the court held Massachusetts courts should disregard any prior indications by the SJC that a jury's silence on one theory of murder is an implied acquittal for double jeopardy purposes.⁴³

In *Commonwealth v. Carlino*, the SJC was correct to not interpret the jury's silence as an acquittal because a jury's silence is not logically equivalent to an acquittal when alternative interpretations are available.⁴⁴ Although silence could indicate an acquittal, silence could alternatively indicate that the jury never deliberated on the theory at all.⁴⁵ It is possible the jury deemed it pointless to convict on a third theory, having already determined Carlino was guilty of first-degree murder under the premeditation and extreme atrocity or cruelty theories.⁴⁶ Further, prior SJC decisions did not clearly obligate the SJC

38. 865 N.E.2d at 770, 774 (addressing issue presented and noting deficiency of verdict slip in Carlino's first trial).

39. *Id.* at 774 n.18 (interpreting possible meanings of verdict slip).

40. *Id.* at 774 (contrasting with cases where jury's conviction on one charge logically implies innocence on another).

41. *Id.* at 775 (noting justice not served by allowing accident or supposition to serve as acquittal). The SJC was unable to determine the jury's intention in leaving the felony-murder theory line blank on the verdict form. *Id.*

42. 865 N.E.2d at 770 (affirming second jury's felony-murder verdict and declining to reduce sentence).

43. *Id.* at 775 (emphasizing courts should disregard contrary SJC decisions suggesting implied acquittals from juries' silence).

44. *See id.* at 774 (discussing convictions where silence alone did not imply acquittal unless logically compelled); *see also supra* note 26 and accompanying text (addressing convictions where courts implied acquittals only if logic demanded).

45. *See* 865 N.E.2d at 774 n.18 (reasoning jury may have intended acquittal, been hung, or not deliberated on felony-murder theory); *see also* *Green v. United States*, 355 U.S. 184, 214 (1957) (Frankfurter, J., dissenting) (opining jury's silence not express finding of not guilty). In disagreeing with the *Green* majority's holding that the jury's silence on a first-degree murder charge and conviction on second-degree murder prevented retrial on first-degree murder, Justice Frankfurter wrote, "All that can with confidence be said is that the jury was in fact silent. Every trial lawyer and every trial judge knows that jury verdicts are not logical products, and are due to considerations that preclude accurate guessing or logical deduction." *Id.*

46. *See supra* note 45 and accompanying text (discussing various interpretations courts can derive from jury's silence); *see also supra* note 27 and accompanying text (discussing various courts' unwillingness to imply acquittal from jury's silence).

to interpret the jury's silence as an acquittal.⁴⁷

Carlino opponents may argue the prohibition against double jeopardy is such a fundamental right that the SJC should have implied an acquittal even if not compelled by logic.⁴⁸ The Commonwealth's interest in punishing criminals and promoting justice, however, outweighs *Carlino*'s interest in avoiding a second trial on the felony-murder theory because an accusation as serious as felony-murder requires an answer from the jury.⁴⁹ Thus, neither logic nor the rationale behind the double jeopardy prohibition required the SJC to interpret the jury's silence as an acquittal.⁵⁰

Earlier SJC decisions that briefly touched on whether courts may interpret jury silence as an implied acquittal conflicted on the significance of the jury's silence for double jeopardy purposes.⁵¹ The SJC, in *Carlino*, squarely addressed this question, and Massachusetts trial judges now have a clear precedent to follow.⁵² Defense attorneys, despite any objections they have to the *Carlino* decision, should request that the trial court judge not discharge the jury until the jury votes up or down on every theory to ensure double jeopardy attaches to the verdict.⁵³

Courts are divided over whether a jury's silence on a particular theory of

47. See *supra* notes 30-37 and accompanying text (discussing conflicting Massachusetts authority on significance of jury's silence). In *Carlino*, the SJC cites footnotes in two other recent SJC decisions, *Commonwealth v. Almonte*, 829 N.E.2d 1094, 1096 n.1 (Mass. 2005), and *Commonwealth v. DePace*, 742 N.E.2d 1054, 1061 n.5 (Mass. 2001), in which the court stated that the jury rejected a theory of first-degree murder. 865 N.E.2d at 774-75; see also *supra* note 30 (considering *Almonte* and *DePace* juries means of communicating rejection of murder theory). According to the court's decision in *Carlino*, however, the records in *Almonte* and *DePace* showed that the juries remained silent on the theories, not that they explicitly rejected them. 865 N.E.2d at 774-75. Neither the *Almonte* nor the *DePace* opinions, however, indicate the juries remained silent on the theories. See generally *Commonwealth v. Almonte*, 829 N.E.2d 1094 (Mass. 2005) (omitting method of jury rejection); *Commonwealth v. DePace*, 742 N.E.2d 1054 (Mass. 2001) (failing to indicate if jury affirmatively rejected theory or just remained silent on theory).

48. Cf. *Terry v. Potter*, 111 F.3d 454, 459-60 (6th Cir. 1997) (holding double jeopardy prohibition important enough to imply acquittal from jury's silence); *State v. Hescocock*, 989 P.2d 1251, 1257 (Wash. Ct. App. 1999) (agreeing with *Terry* in holding jury silence on counts bars further prosecution on those counts).

49. Compare *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1050 (2d Cir. 1972) (reasoning fairness demands verdict of acquittal or lesser-included offenses conviction before double jeopardy attaches), *AMAR supra* note 17, at 116 (suggesting Double Jeopardy Clause intended to ensure fairness between state and individual interests), and *supra* note 20 and accompanying text (discussing how government's interest in justice allows retrial after reversed conviction), with 865 N.E.2d at 775 (stating interests of justice not served by entering acquittal by accident or supposition).

50. See *Green v. United States*, 355 U.S. 184, 214 (1957) (Frankfurter, J., dissenting) (arguing jury's silence not logically equivalent to acquittal); *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1050 (2d Cir. 1972) (noting justice dictates criminal trials result in verdicts); 865 N.E.2d at 774 (observing most courts refuse to interpret jury's silence as implied acquittal unless logic requires); *supra* note 26 (citing cases where courts only implied acquittals if logic required).

51. See *supra* notes 30-37 and accompanying text (citing conflicts between SJC cases on double jeopardy significance of jury silence).

52. See 865 N.E.2d at 775 (instructing courts to disregard SJC decisions with holdings contrary to *Carlino*).

53. Cf. *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1053 (2d Cir. 1972) (Mansfield, J., concurring) (arguing defense attorney's choices during first trial allowed retrial after jury's silence on theory).

first-degree murder is an implied acquittal for double jeopardy purposes. Some courts have held the government may retry the defendant on that theory while other courts bar retrial on the theory. In *Commonwealth v. Carlino*, the SJC held double jeopardy principles do not prevent a second jury from considering a theory on which the first jury remained silent. The SJC reasoned it could not assume an implied acquittal from a jury's silence unless it could logically discern the intent of the jury.

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