

# Landmark Decision Alters 'tactical Landscape for Prosecutors

By Ted Lothstein

Last June, in a landmark decision that received little notice, the New Hampshire Supreme Court adopted a "mandatory joinder" rule that promises to have a lasting and widespread impact on our criminal justice system. The Court embraced that rule in *State v. Locke* to avoid an unjust outcome – continued criminal prosecution after acquittal by jury – under circumstances where the rule against double jeopardy did not necessarily apply.

Several months later, the Court applied the new rule in the *Glenn* appeal (which this author handled; see page 32 for a summary of the case) to require the post-conviction dismissal of five felony charges.

With these two decisions, the Court substantially changed the tactical landscape for prosecutors as they select charges for potential indictment against a defendant.

In *State v. Locke*, the Court addressed the appeal from a criminal prosecution that had followed a truly bizarre procedural path. In a storyline that would be more at home on a sensationalized TV crime drama than in the real-life justice system, Jamie Locke was first acquitted by a jury that actually intended to convict her, and then convicted by a jury that, according to the New Hampshire Supreme Court, never should have been allowed to hear the case.

The case arose out of reports that on a cold November night, several individuals had beaten a highly intoxicated man and thrown him over an embankment into the frigid waters of the Merrimack River. The Concord Police, responding to the emergency call but unable to negotiate the steep

## Key Take-Aways from *Locke* and *Glenn*

- Chris Johnson's advocacy should serve as a reminder that when a factual scenario presents a compelling case for relief, but the law is unfavorable, it's important to argue that the law should be changed – even if it's a long shot. The Court has reversed itself or adopted new doctrines on many occasions in both civil and criminal appeals in recent years. We all have heard that "bad facts make bad law." The *Locke* decision reminds us that good facts make new law.
- Don't be hesitant to challenge the Court's past decisions or its doctrinal approaches to legal issues in briefing or oral argument. At the last Appellate Advocacy CLE, members of the Court encouraged the audience to openly question its decisions and doctrines – the *Locke* decision demonstrates that they meant what they said.
- Poll the jury when you lose. Even though it only makes a difference in one in, perhaps, 1,000 cases, you don't want your client to be that one and have no available relief.
- Read your slip opinions the day they come out!

embankment, reportedly had to send out a boat to rescue the victim.

Locke and two other defendants were indicted on a number of felony charges, including, for Locke, conspiracy to commit murder, accomplice to attempted murder, attempted murder, and first-degree assault, as principal and accomplice. She took her case to trial, and the jury acquitted her of all but one charge, accomplice to attempted murder, which the trial judge then dismissed as alleging a crime that did not exist in New Hampshire. Thus, the case was over, right?

Wrong. Immediately after the verdict, in a stranger-than-fiction turn of events, the jury foreman revealed to the presiding judge

that the jury had actually voted to convict Locke of conspiracy to commit murder, but the foreman had misread the verdict.

The trial court found that the State had waived any objection to the accuracy of the State's verdict by failing to move to poll the jury. Understandably unwilling to "let it go," the prosecution brought new indictments for second-degree assault, as accomplice and principal – crimes that carried a different label, but arose out of the same criminal episode as the first degree assault indictments that had ended in acquittals. Locke was convicted of second-degree assault and brought her appeal.

In his brief, Appellate Defender Chris

Johnson contended that conviction on retrial, following acquittal on charges arising out of the same set of facts, violated Locke's right against double jeopardy. However, as the Court itself acknowledged in the *Locke* decision, our State's double jeopardy jurisprudence, like Locke's case itself, has followed a twisting and inconsistent path, at best of uncertain application to a case like Locke's, where the "new" indictment arose out of already-tried facts, but required proof of different "elements" (legal building blocks that form the definition of the crime).

Apparently recognizing that the case could go either way, in the closing paragraphs of his brief, Johnson proposed an alternative path for the Court to follow. He pointed out that, in a pair of decisions from the late 1970s, the Court had mentioned the existence of a "mandatory joinder" doctrine, followed by several other States, which precluded prosecutors from bringing new charges following an acquittal, if the new charges arose out of the same conduct or same criminal episode. However, these passages of his brief represented something of a "hail Mary," not only because the issue had not been preserved in the trial court, but also because the Court has not so much as mentioned the doctrine in the last 35 years.

At the same time, I was preparing my brief in the *Glenn* appeal, a case that followed a somewhat different procedural path but raised the same issue of fundamental fairness: If the prosecution brings an indictment or indictments to a jury and does not prevail, should the prosecution be allowed

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or are likely to be helpful to law enforcement or government officials.

In early 2015, the Wage and Hour Division (WHD) of the Department of Labor will expand its U visa program by certifying such requests when it detects three qualifying criminal activities in the course of its workplace investigations of extortion, forced labor, and fraud in foreign labor contracting. This will help qualifying victims of crimes receive immigration relief from the Department of Homeland Security (DHS) and access a range of victim services needed to rebuild their lives.

T nonimmigrant visas provide legal status to certain victims of human trafficking who assist law enforcement authorities in the investigation or prosecution of trafficking crimes.

### Domestic Violence

A slight variation to the U visa, an undocumented battered child, spouse or domestic partner, married or unmarried may be eligible for a Green Card under the Violence against Women Act (VAWA). The harm may be physical or psychological.

Domestic violence is a big red flag. If convicted of DV or violating a protective order or injunction, an immigrant is virtually certain of being deported and likely ineligible for a Green Card or become naturalized as a US citizen, even if the complaining spouse or partner later attempts to disavow the claim.

**Practice pointer:** When entering a plea in domestic cases in state Circuit

ception” may apply. Other bars to naturalization may arise from:

- a conviction for multiple crimes for which the applicant was sentenced to five years or more in the aggregate
- a violation of the controlled substance laws of any country. One exception: a single conviction for simple possession of 30 grams or less of marijuana
- giving false testimony for the purpose of obtaining an immigration benefit
- one or more DWI convictions
- nonsupport of dependents of a spouse or children outside the US
- a failure to register with the Selective Service

Generally, there is a five-year look-back period, but USCIS can review earlier history, if it appears that the Green Card holder is not “rehabilitated.”

**Practice pointer:** Advise the client to change the picture for USCIS prior to Green Card renewal by volunteering for a nonprofit, keeping steady employment, developing friendships in the community and joining civic organizations.

### Ineffective Assistance of Counsel

In the 2010 case of *Padilla v. Kentucky*, the US Supreme Court found ineffective assistance of counsel following failure to advise defendant that his plea could result in deportation. It held that the defendant under the 6th Amendment had a right to notice of immigration consequences.

In *State v. Deicy Urena Ortiz* (2012), the NH State Supreme Court held that due process protections do not require

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to try the same defendant on the same fact pattern, but with different charging theories?

In his first trial, although witnesses painted a picture that could support multiple criminal offenses, Charles Glenn Jr. had been indicted for only two charges – first-degree murder and second-degree murder. Glenn was acquitted of first-degree murder, and the jury failed to reach a verdict on second-degree murder.

Well-established double jeopardy law allowed the prosecution to retry the indictment that resulted in a hung jury, but the State, hedging its bets, also added five new felony charges arising out of the same criminal episode, including criminal threatening, attempted robbery, felon in possession of a firearm, and falsification of physical evidence. Like Johnson, I had raised a number of double jeopardy and other arguments in opposition to these “new” indictments, but unlike Johnson, I had not suggested that the Court should adopt the mandatory joinder doctrine.

On June 13, 2014, the Court announced its decision in *Locke*. Expressing a laudable degree of self-reflection, the Court criticized a pattern of doctrinal inconsistency in its own double jeopardy jurisprudence that had persisted for over two decades. The Court was able to bypass this thicket by adopting the mandatory joinder rule, which offers a much simpler solution: At the outset of the prosecution, the State must join together all charges that it intends to pursue against the defendant that arise from the same conduct

or criminal episode. The Court applied the new rule prospectively, and to all other cases then pending on direct appeal.

I read the *Locke* slip opinion, announced through the Court’s email service, and hastily prepared and filed a motion the next business day asking to add an issue to Glenn’s appeal: Whether the new mandatory joinder doctrine would require dismissal of the five new felony charges indicted for Glenn’s retrial. We briefed that issue, and last month, the Court announced its decision – all of those convictions were vacated.

While it has not been the subject of much fanfare in the media, the *Locke* decision is nothing less than a landmark decision in the history of criminal procedure in New Hampshire, as evidenced by its immediate impact on the then-pending *Glenn* appeal.

In the two decades that I have practiced, I have had the discussion on many occasions with clients, that even if we prevail on the charges presently pending, there is always the possibility that the State could come back later with new prosecutorial theories. As discussed, double jeopardy law under the State Constitution is of, at best, murky application to these scenarios.

From this point forward, at the outset, prosecutors must make what will likely be a “final decision” as to which charges should be brought against the accused. This is a significant change in the tactical landscape for prosecutors and defense lawyers in this state.

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