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# Casenotes: Criminal Law — Conspiracy — Rule of Conspiratorial Consistency Not Applicable to Verdicts Rendered in Separate Trials. Gardner v. State, 286 Md. 520, 408 A.2d 1317 (1979)

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# CASENOTES

CRIMINAL LAW — CONSPIRACY — RULE OF CONSPIRATORIAL CONSISTENCY NOT APPLICABLE TO VERDICTS RENDERED IN SEPARATE TRIALS. *GARDNER v. STATE,* 286 Md. 520, 408 A.2d 1317 (1979).

## I. INTRODUCTION

It is well settled that the perpetration of a criminal conspiracy requires the participation of at least two persons.[1] Therefore, a defendant may not be convicted of conspiracy when all of his alleged co-conspirators have been acquitted.[2] This principle, known as the rule of conspiratorial consistency,[3] has long been recognized in Maryland.[4] Recently, however, the Court of Appeals of Maryland, in *Gardner v. State,*[5] affirmed the conspiracy conviction of a criminal defendant whose sole alleged co-conspirator had been acquitted in a separate trial. The court held that verdicts rendered against co-conspirators need not be consistent when each defendant is tried separately.[6] In so holding, the court limited the application of the consistency rule to verdicts delivered in a joint trial.

This casenote reviews the development of the consistency rule and the underlying principles upon which the rule is based. In addition, the validity and implications of *Gardner* are examined, with particular emphasis on whether collateral estoppel will bar the prosecution of an alleged conspirator whose sole alleged co-conspirator has been previously acquitted.

## II. FACTUAL BACKGROUND

On April 29, 1977, Roger Gardner and Ralph Lubow were arrested and charged with two counts of conspiring to commit murder.[7] Gardner requested a separate trial[8] and was tried without a jury several months before Lubow.[9] Claiming that Lubow was

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1. *E.g.,* De Camp v. United States, 10 F.2d 984, 985 (D.C. Cir. 1926); Bloomer v. State, 48 Md. 521, 536 (1878); People v. Heidt, 312 Mich. 629, 642, 20 N.W.2d 751, 756 (1945); W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 9.00, at 489 (6th ed. 1952) [hereinafter cited as CLARK & MARSHALL].
2. *E.g.,* Hurwitz v. State, 200 Md. 578, 592, 92 A.2d 575, 581 (1952); CLARK & MARSHALL, *supra* note 1, § 9.07 at 519; L. HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE § 290, at 323 (2d ed. 1904).
3. Gardner v. State, 286 Md. 520, 524, 408 A.2d 1317, 1319 (1979).
4. *See* Bloomer v. State, 48 Md. 521, 536 (1878).
5. 286 Md. 520, 408 A.2d 1317 (1979).
6. *Id.* at 528, 408 A.2d at 1322.
7. Brief for Appellant at 1, Gardner v. State, 286 Md. 520, 408 A.2d 1317 (1979). Gardner and Lubow were also charged with a handgun violation and two counts of solicitation to commit murder. Brief for Appellee at 1, Gardner v. State, 41 Md. App. 187, 396 A.2d 303 (1979).
8. A separate trial is permitted in Maryland under rule 745. MD. R.P. 745.
9. 286 Md. 520, 522, 408 A.2d 1317, 1319 (1979).

legally insane at the time of the alleged agreement to conspire, Gardner asserted as his primary defense that there could be no conspiracy because Lubow's insanity negated the existence of the requisite joint criminal intent.[10] The trial court rejected this argument, specifically finding Lubow competent at the time of the agreement.[11] Gardner was found guilty on both counts of conspiracy[12] and appealed his conviction to the Court of Special Appeals of Maryland.[13]

While Gardner's appeal was pending, Lubow was tried before a jury and found not guilty by reason of insanity.[14] When Gardner appeared before the court of special appeals, he urged the court to apply the consistency rule and reverse his conviction in light of Lubow's acquittal.[15] The court of special appeals affirmed the judgment of the trial court, holding that the disposition of Lubow's case did not affect the validity of Gardner's conviction.[16] Gardner appealed to the Court of Appeals of Maryland, which affirmed the decision below.[17]

## III. HISTORICAL DEVELOPMENT OF CONSPIRACY

According to most legal scholars, conspiracy was first proscribed as criminal in a fourteenth century English statute.[18] Under

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10. Gardner v. State, 41 Md. App. 187, 191, 396 A.2d 303, 306, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979). The defense relied primarily upon the decision of the Court of Special Appeals of Maryland in Regle v. State, 9 Md. App. 346, 264 A.2d 119 (1970). In *Regle*, the court held that "where only two persons are implicated in a conspiracy, and one is shown to have been insane at the time the agreement was concluded, and hence totally incapable of committing any crime, there is no punishable criminal conspiracy, the requisite joint criminal intent being absent." *Id.* at 355, 264 A.2d at 124.
11. 286 Md. 520, 522, 408 A.2d 1317, 1319 (1979). The court of appeals quoted the trial judge as stating:

> I find that the State has met its burden and has established beyond a reasonable doubt that Mr. Lubow . . ., although he suffered from a mental disorder . . . [did] have substantial capacity to appreciate the criminality of his conduct during the period in question and he did have substantial capacity to conform his conduct to the requirements of the law during that period and, therefore, I rule in the legal sense that he was not insane during that period and that, therefore, the conspiracy was formed.

*Id.* at 528—29, 408 A.2d at 1319.
12. In addition, the trial judge found Gardner guilty of solicitation to commit murder. Gardner was sentenced to a term of five years imprisonment. *Id.* at 522, 408 A.2d at 1319.
13. Gardner v. State, 41 Md. App. 187, 396 A.2d 303, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979).
14. Gardner v. State, 286 Md. 520, 523, 408 A.2d 1317, 1319 (1979).
15. Brief for Appellant at 16—19, Gardner v. State, 41 Md. App. 187, 396 A.2d 303 (1979). Gardner also argued that his conviction of solicitation to commit murder was not supported by sufficient evidence. The court rejected this argument and affirmed his conviction. 41 Md. App. 187, 200—01, 396 A.2d 303, 311, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979).
16. 41 Md. App. 187, 198, 396 A.2d 303, 310, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979).
17. Gardner v. State, 286 Md. 520, 408 A.2d 1317 (1979).
18. *See* 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 378—79 (1966); 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 228 (1882); Arens, *Conspiracy Revisited*, 3 BUFFALO L. REV. 242, 243—44 (1954); Blair, *The Judge-Made Law of Conspiracy*, 37 AM.

this statute,[19] conspiracy was narrowly defined as the malicious procurement of a false indictment. This offense, which frustrated the administration of justice, was punishable only after the person falsely accused had been acquitted.[20]

It was not until the *Poulterer's Case*,[21] decided by an English court in 1611, that the mere agreement to accuse falsely was declared a substantive offense, punishable even if the victim had not been indicted.[22] Eventually, the crime of conspiracy was further expanded to encompass not only agreements to accuse falsely, but also agreements to commit any wrongful act.[23] This broadened definition of conspiracy was ultimately adopted in the United States.

Presently, criminal conspiracy is defined as a combination of two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means.[24] Because the gravamen of

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L. REV. 33 (1903); Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 624—25 (1941); Pollack, *Common Law Conspiracy*, 35 GEO. L.J. 328, 339—40 (1947) [hereinafter cited as Pollack]; Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 395 (1922) [hereinafter cited as Sayre]; *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922—23 (1959) [hereinafter cited as *Developments*].

It should be noted that some early American judges concluded that conspiracy was a common law offense independent of the early English statute. *E.g.*, State v. Buchanan, 5 H. & J. 317, 344 (Md. 1821); *accord*, Commonwealth v. Donohue, 250 Ky. 343, 63 S.W.2d 3 (1933); State v. Green, 344 Mo. 985, 130 S.W.2d 475 (1939); 2 J. BISHOP, NEW CRIMINAL LAW § 176 (1882). For a refutation of this view, see Blair, *The Judge-Made Law of Conspiracy*, *supra*, at 47—51.

19. Ordinance of Conspirators, 1305, 33 Edw. I. The statute provided in pertinent part:
> Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every one of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers; and stewards and bailiffs of great lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estates of their lords or themselves.

*Id.*

20. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 625 (1941); Sayre, *supra* note 18, at 397.
21. 77 Eng. Rep. 813 (Star Ch. 1611).
22. In the *Poulterer's Case*, several poulterers agreed to falsely charge Stone with robbery, but no indictment was returned by the grand jury. Suit was brought against the poulterers for conspiracy. As a defense, the defendant poulterers argued that because Stone had never been indicted, they could not be found guilty of conspiracy. *Id.* The Star Chamber rejected this argument and held that the confederation, rather than the false indictment and subsequent acquittal, constituted the offense. *Id.* at 814.

Commentators have suggested that the modern development of conspiracy stems entirely from the decision of the Star Chamber in the *Poulterer's Case*. *See* Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 625 (1941); Pollack, *supra* note 18, at 342. *See also* 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 378 (1966).

23. 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 379 (1966).
24. *E.g.*, Regle v. State, 9 Md. App. 346, 350, 264 A.2d 119, 122 (1970); State v. Littlejohn, 264 N.C. 571, 574, 142 S.E.2d 132, 134 (1965); State v. Smith, 197 Tenn. 350, 354, 273 S.W.2d 143, 145—46 (1954); CLARK & MARSHALL, *supra* note 1, § 9.00 at 489; J. MILLER, HANDBOOK OF CRIMINAL LAW 108 (1934). Although this definition is generally given, many courts and text writers have suggested that it is impossible to confine conspiracy within

conspiracy is the unlawful agreement[25] between two or more persons, the crime may not be committed by one person acting alone.[26] From this general principle arose the rule of conspiratorial consistency: a defendant may not be convicted of conspiracy when all of his alleged co-conspirators have been acquitted.[27]

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the boundaries of a definitive statement. *See* Smith v. People, 25 Ill. 17, 23 (1860). In Commonwealth v. Donohue, 250 Ky. 343, 63 S.W.2d 3 (1933), the court noted that "[t]he comprehensiveness and indefiniteness of the offense of conspiracy has made an exact definition a very difficult one . . . ." *Id.* at 347, 63 S.W.2d at 5. *See generally* Pollack, *supra* note 18, at 329—38; 18 TEMP. U. L.Q. 268, 269 (1943).

25. "[I]t is the overt act of combining-confederating minds that forms the hard core of conspiracy rather than acts done in furtherance of the . . . agreement." CLARK & MARSHALL, *supra* note 1, § 9.00 at 489—90; *accord*, Marshall v. People, 160 Colo. 323, 328, 417 P.2d 491, 494 (1966); Smith v. State, 241 Ind. 311, 317—18, 170 N.E.2d 794, 798 (1960); Greenwald v. State, 221 Md. 245, 250, 157 A.2d 119, 122, *cert. denied*, 363 U.S. 719 (1960); State v. Carbone, 10 N.J. 329, 337, 91 A.2d 571, 574 (1952). *But cf.* Cave v. United States, 390 F.2d 58, 69 (8th Cir.) (conspiracy requires an agreement attended by an overt act toward effecting the object of the agreement), *cert. denied*, 392 U.S. 906 (1968).

26. "The impossibility of one person forming a combination with himself is too obvious for discussion . . . ." R. PERKINS, CRIMINAL LAW 622 (2d ed. 1969). *But see* MODEL PENAL CODE § 5.03 (1962). The Model Penal Code departs from the traditional requirement that the guilt of at least two persons must be established. In § 5.03, the Code defines conspiracy in terms of a person agreeing *with* another, as opposed to an agreement *between* two or more persons. By emphasizing individual, rather than group liability, the guilt of each conspirator is made independent of that of his co-conspirators. MODEL PENAL CODE § 5.03, Comment (Tent. Draft No. 10, 1960).

27. *E.g.*, Gardner v. State, 286 Md. 520, 524, 408 A.2d 1317, 1319 (1979); Hurwitz v. State, 200 Md. 578, 592, 92 A.2d 575, 581 (1952). The rationale underlying the consistency rule was well stated by the Court of Special Appeals of Maryland in Regle v. State, 9 Md. App. 346, 264 A.2d 119 (1970):

> [T]hat it is illogical to acquit all but one of a purported partnership in crime; that acquittal of all persons with whom a defendant is alleged to have conspired is repugnant to the existence of the requisite corrupt agreement; and that regardless of the criminal animus of the defendant, there must be someone with whom he confected his corrupt agreement and where all his alleged co-conspirators are not guilty, a like finding as to him must be made.

*Id.* at 351—52, 264 A.2d at 122.

The consistency rule is inapplicable when the disposition of the co-conspirator's case amounts to less than an acquittal. *See, e.g.*, United States v. Monroe, 164 F.2d 471 (2d Cir. 1947) (unindicted), *cert. denied*, 333 U.S. 828 (1948); Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938) (immune from prosecution); Rosenthal v. United States, 45 F.2d 1000 (8th Cir. 1930) (unapprehended); People v. Nall, 242 Ill. 284, 89 N.E. 1012 (1909) (dead); Adams v. State, 202 Md. 455, 97 A.2d 281 (1953) (unknown), *rev'd on other grounds*, 347 U.S. 179 (1954); Hurwitz v. State, 200 Md. 578, 92 A.2d 575 (1952) (immune from prosecution); Commonwealth v. MacKenzie, 211 Mass. 578, 98 N.E. 598 (1912) (unapprehended); State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947) (dead); 33 TUL. L. REV. 393 (1959). *See generally Developments*, *supra* note 18, at 972. The jurisdictions are split on whether a conspirator may be convicted when the only other alleged co-conspirator has been granted a nolle prosequi. *Compare* United States v. Fox, 130 F.2d 56 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942); United States v. Lieberman, 8 F.2d 318 (E.D.N.Y. 1925); People v. Bryant, 409 Ill. 467, 100 N.E.2d 598 (1951); La Fortez v. State, 11 Md. App. 598, 275 A.2d 526 (1971); *and* State v. Lloyd, 152 Wis. 24, 139 N.W. 514 (1913) *with* United States v. Shipp, 359 F.2d 185 (6th Cir.), *cert. denied*, 385 U.S. 903 (1966); Feder v. United States, 257 F. 694 (2d Cir. 1919); *and* State v. Jackson, 7 S.C. 283 (1876). *See generally* 15 DET. L.J. 148 (1952); 18 TEMP. U. L.Q. 268 (1943); 1967 UTAH L. REV. 322.

The vast majority of jurisdictions apply the consistency rule when all participants of an alleged conspiracy are tried together.[28] There is a division between the jurisdictions, however, as to whether the rule applies when the alleged conspirators are tried separately.[29] In *State v. Tom*,[30] the earliest American case addressing the issue, the Supreme Court of North Carolina held that the rule of conspiratorial consistency applied with equal force to verdicts in separate trials.[31] The court stated that "the operation on one [conspirator] of the acquittal of the other does not arise from the mode of pronouncing it, but from the fact of the acquittal itself being in due course of law, [and] the guilt of one being dependent upon the other."[32]

The majority of the jurisdictions that have commented on the issue have approved of the rule enunciated in *State v. Tom*.[33] Recently, however, a growing number of jurisdictions have expressed approval of the minority view, which does not require consistent verdicts in separate trials.[34] This view was first delineated by the Nebraska Supreme Court in *Platt v. State*.[35]

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28. *See, e.g.*, Bartkus v. United States, 21 F.2d 425 (7th Cir. 1927); VanTress v. United States. 292 F. 513 (6th Cir. 1923); Kirkwood v. United States, 256 F. 825 (8th Cir. 1919); People v. MacMullen, 134 Cal. App. 81, 24 P.2d 794 (1933); Archuleta v. People, 149 Colo. 206, 368 P.2d 422 (1962); People v. Regan, 351 Ill. App. 550, 115 N.E.2d 817 (1953); State v. Raper, 204 N.C. 503, 168 S.E. 831 (1933).
29. *Compare* State v. Tom, 13 N.C. (2 Dev.) 371 (1830) *with* Platt v. State, 143 Neb. 131, 8 N.W.2d 849 (1943).
30. 13 N.C. (2 Dev.) 371 (1830).
31. *Id.* at 377.
32. *Id.*
33. *See, e.g.*, Romontio v. United States, 400 F.2d 618, 619 (10th Cir. 1968), *cert. dismissed*, 402 U.S. 903 (1970); Miller v. United States, 277 F. 721, 726 (4th Cir. 1921); United States v. Bruno, 333 F. Supp. 570, 577 (E.D. Pa. 1971); Pearce v. State, 330 So. 2d 783, 784 (Fla. App.), *cert. denied*, 341 So. 2d 293 (Fla. 1976); People v. Levy, 299 Ill. App. 453, 458—59, 20 N.E.2d 171, 173 (1939); Casper v. State, 47 Wis. 535, 544, 2 N.W. 1117, 1119 (1879); *accord*, Eyman v. Deutsch, 92 Ariz. 82, 373 P.2d 716 (1962), *noted in* 36 TEMP. L.Q. 360 (1963); 24 U. PITT. L. REV. 647 (1963).

    In Casper v. State, 47 Wis. 535, 2 N.W. 1117 (1879), the court set forth the justification for the majority position as follows:

    > [W]here several are prosecuted together, taken, and may be brought to trial, for conspiracy, and, their trial being severed, one only has been tried and found guilty, there is manifest impropriety in proceeding to judgment against him before the trial of his co-defendants. The verdict against him would raise no presumption against them, and their acquittal would be inconsistent with his conviction, and should operate in law to acquit him also. Judgment against him, in such case, would not only be a cruel injustice, but an absurdity, which the law ought not to sanction, for one only cannot be guilty of conspiracy, and judgment against one, upon acquittal of those charged with him, would be not only a wrong to the person, but a blunder in the law.

    *Id.* at 544, 2 N.W. at 1119.
34. *See, e.g.*, United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980); Rosencrans v. United States, 378 F.2d 561 (5th Cir. 1967); People v. Holzer, 25 Cal. App. 3d 456, 460, 102 Cal. Rptr. 11, 13 (1972); State v. Oats, 32 N.J. Super. 435, 108 A.2d 641 (1954); People v. Berkowitz, 50 N.Y.2d 333, 406 N.E.2d 783, 428 N.Y.S.2d 927 (1980). *See generally* Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 957—58 (1977); *Developments, supra* note 18, at 972.
35. 143 Neb. 131, 8 N.W.2d 849 (1943), *noted in* 27 NEB. L. REV. 443 (1948).

Prior to *Gardner v. State*,[36] the Court of Appeals of Maryland had never directly addressed the issue of whether the rule of conspiratorial consistency should be applied to separate trials.[37] The early Maryland case of *Bloomer v. State*,[38] however, appears to recognize the applicability of the consistency rule to separate trials. In *Bloomer*, the defendant offered into evidence the record of his alleged co-conspirator's acquittal by a New Jersey court.[39] The *Bloomer* court noted that when only two persons are charged with conspiracy, the acquittal of one mandates the acquittal of the other.[40] The court qualified this statement, however, by holding that the acquittal of the one conspirator must be by a court of competent jurisdiction in the same state in which the prosecution of the other is pending.[41] Because the co-conspirator's acquittal was by a New Jersey court, the *Bloomer* court concluded that the acquittal did not bar the defendant's prosecution in Maryland.[42] To the extent that it implied that the rule of consistency was applicable to verdicts rendered in separate trials, the dicta in *Bloomer* was expressly disapproved of by the court in *Gardner*.[43]

## IV. THE COURT'S OPINION

In *Gardner v. State*,[44] the primary issue before the court of appeals was whether one conspirator's conviction may stand when the sole alleged co-conspirator is acquitted at a subsequent trial.[45] Relying on the rule of conspiratorial consistency, the defendant argued that his conviction was inconsistent with the acquittal of Lubow, his sole alleged co-conspirator, and should therefore be reversed.[46] The state argued that the consistency rule should not be applied to separate trials. Alternatively, the state contended that Lubow's acquittal by reason of insanity did not necessarily negate the existence of an illegal meeting of the minds. The court of appeals adopted the state's first argument and affirmed Gardner's conviction. The second argument presented by the state was not addressed.

In refusing to apply the consistency rule to separate trials, the court relied primarily upon the Nebraska Supreme Court's decision in *Platt v. State*.[47] Adopting the rationale in *Platt*, the *Gardner* court

36. 286 Md. 520, 408 A.2d 1317 (1979).
37. *Id.* at 525, 408 A.2d at 1320.
38. 48 Md. 521 (1878).
39. *Id.* at 535—36.
40. *Id.* at 536.
41. *Id.*
42. *Id.*
43. 286 Md. 520, 528, 408 A.2d 1317, 1321 (1979).
44. 286 Md. 520, 408 A.2d 1317 (1979).
45. *Id.* at 522, 408 A.2d at 1319.
46. *Id.* at 523, 408 A.2d at 1319.
47. 143 Neb. 131, 8 N.W.2d 849 (1943).

stated that a guilty verdict rendered in the trial of one conspirator also concludes the guilt of the other conspirator for purposes of that trial.[48] Once the guilt of the untried co-conspirator is found against the convicted defendant, the required elements of conspiracy are established. Therefore, the conviction is proper, and its validity is not affected by the acquittal of the co-conspirator in a later trial.[49]

Based upon this reasoning, the *Gardner* court held that verdicts rendered in separate trials need not be consistent, but that the evidence adduced at each trial must be sufficient in itself to support the verdict rendered.[50] Concluding that the evidence presented at Gardner's trial supported the finding that Gardner and Lubow conspired, the court of appeals upheld the conviction.[51]

## V. ANALYSIS

### *A. The Rule of Conspiratorial Consistency*

Application of the conspiratorial consistency rule is legally imperative in the context of a joint trial. When both participants in an alleged conspiracy are tried together, a failure of proof as to one necessarily amounts to a failure of proof as to both.[52] If one alleged conspirator is convicted and the other is acquitted, the court is faced with two conflicting factual determinations based on the same presentation of evidence.[53] Although the conviction of one indicates a finding that both conspired, the acquittal of the other denies that determination. Because the law requires verdicts to be inherently consistent,[54] the guilty verdict should not be permitted to stand.

As the *Gardner* court judiciously concluded, the rationale of the consistency rule does not apply when the alleged conspirators are tried separately.[55] A guilty verdict rendered at the trial of one conspirator determines the guilt of the other conspirator for the pur-

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48. 286 Md. 520, 527, 408 A.2d 1317, 1321 (1979).
49. *Id.*
50. *Id.* at 528, 408 A.2d at 1322.
51. *Id.* at 528—29, 408 A.2d at 1322.
52. People v. Superior Ct., 44 Cal. App. 3d 494, 498, 118 Cal. Rptr. 702, 704 (1975); *see, e.g.*, Bartkus v. United States, 21 F.2d 425 (7th Cir. 1927); VanTress v. United States, 292 F. 513 (6th Cir. 1923); Kirkwood v. United States, 256 F. 825 (8th Cir. 1919); People v. MacMullen, 134 Cal. App. 81, 24 P.2d 794 (1933); Archuleta v. People, 149 Colo. 206, 368 P.2d 422 (1962); People v. Regan, 351 Ill. App. 550, 115 N.E.2d 817 (1953); State v. Raper, 204 N.C. 503, 168 S.E. 831 (1933). *See also* Hurwitz v. State, 200 Md. 578, 92 A.2d 575 (1952). *But see* 28 SOL J. 439 (1884).
53. Such an inconsistency reflects a defect in the functioning of the jury. The jury has either failed to adhere to the conspiracy requirement that at least two guilty minds must concur, or it has impermissibly weighed the same evidence differently in regard to each defendant. People v. Superior Ct., 44 Cal. App. 3d 494, 498, 118 Cal. Rptr. 702, 704 (1975).
54. Platt v. State, 143 Neb. 131, 140, 8 N.W.2d 849, 854 (1943). *But see* United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980).
55. 286 Md. 520, 528, 408 A.2d 1317, 1322 (1979).

poses of that trial.[56] Therefore, the verdict is inherently consistent and should not be disturbed.

Those jurisdictions that require consistent verdicts in separate trials[57] view an acquittal as a judicial determination that the acquitted defendant did not participate in the conspiracy.[58] The fallacy of this view is the failure to recognize that one alleged conspirator may be acquitted for reasons unrelated to his actual guilt or innocence. An acquittal may result from the death or absence of an important state witness, the inadmissibility of the convicted conspirator's confession, the inadmissibility of physical evidence obtained in violation of the acquitted defendant's constitutional rights,[59] or for any other reason that would result in a failure of proof.[60] Unlike its effect in a joint trial, the acquittal of an alleged conspirator in a separate trial establishes only that the prosecution failed to sustain its burden of proof as to that defendant.[61] The acquittal does not preclude a determination in the co-conspirator's trial, based upon a different presentation of evidence, that a conspiracy existed.[62]

The *Gardner* court's decision, limiting the consistency rule to joint trials, is also supported by policy considerations. The state has a strong interest in protecting society and punishing criminals. If one conspirator is found guilty, striking his conviction merely because the state failed to sustain its burden of proof in the trial of his co-conspirator would frustrate the state's interest. With the *Gardner* decision, the Court of Appeals of Maryland prevents this undesirable result.

In light of the inappropriateness of applying the consistency rule in separate trials, the court's decision to uphold Gardner's conviction is well-founded. The evidence presented at Gardner's trial was sufficient to support the guilty verdict. Thus, there was no justification for affording him the benefit of the state's failure to sustain its burden of proof in Lubow's trial.[63]

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56. *Id.* at 529, 408 A.2d at 1322.
57. *E.g.*, Romontio v. United States, 400 F.2d 618 (10th Cir. 1968), *cert. dismissed*, 402 U.S. 903 (1970); State v. Tom, 13 N.C. (2 Dev.) 371 (1830); Casper v. State, 47 Wis. 535, 2 N.W. 1117 (1879).
58. *See, e.g.*, Farnsworth v. Zerbst, 98 F.2d 541, 544 (5th Cir. 1938).
59. An acquitted defendant's co-conspirators usually lack the requisite standing to object to the admissibility of such evidence at their own trials. Generally, a defendant may assert the exclusionary rule only to bar the admission of evidence obtained in violation of his own constitutional rights. Alderman v. United States, 394 U.S. 165 (1969).
60. Platt v. State, 143 Neb. 131, 143, 8 N.W.2d 849, 855 (1943).
61. *Id.; see* People v. Berkowitz, 50 N.Y.2d 333, 406 N.E.2d 783, 428 N.Y.S.2d 927 (1980).
62. People v. Holzer, 25 Cal. App. 3d 456, 460, 102 Cal. Rptr. 11, 13 (1972).
63. *See Developments, supra* note 18, at 974. One commentator has noted that the practical effect of applying the consistency rule to separate trials is:

> to allow a defendant the benefits of two different trials—his own and that of his co-conspirator . . . . Thus the prosecution is imposed with the greatly increased burden of proving the guilt of a defendant to twenty-four jurors rather than the normal twelve before the case against either of the defendants may be disposed

*B. The Insanity Defense*

The *Gardner* court did not consider the state's argument that Lubow's acquittal was not inconsistent with Gardner's conviction because, even if Lubow was legally insane at the time of the agreement, an illegal meeting of the minds could have occurred.[64] Consequently, the question remains as to whether one of two alleged conspirators can properly be found guilty when his co-conspirator is found to have been insane at the time of the agreement.[65] This issue was first considered by the Court of Special Appeals of Maryland in *Regle v. State*.[66]

In *Regle*, the court held that one of two alleged conspirators cannot be convicted when the other is shown to have been insane at the time of the agreement.[67] The court emphasized that it is the confederation of at least two criminal intents that is punishable as a conspiracy.[68] Because an insane person is mentally incapable of forming a criminal intent, the requisite joint criminal intent is absent and there can be no punishable conspiracy.[69] In *Gardner*, the court of special appeals agreed in dicta[70] with the state's argument that *Regle* does not represent a complete and accurate statement of the law.[71]

In a conspiracy prosecution, the theory upon which a conspirator is found to be legally insane is of material significance. Maryland law provides that an accused may be found legally insane "if he lacks substantial capacity either to appreciate the criminality of his conduct *or* to conform his conduct to the requirements of the law."[72] Under the first prong of this test, a defendant escapes criminal responsibility because he lacks the requisite intent to commit a

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> of with any degree of finality. Granted, the accused should be given the entire benefit of any advantage the law may allow in a criminal proceeding, but when an accused has received a fair trial he seems entitled to no more.

65 W. VA. L. REV. 151, 154 (1963).

64. *See* Brief for Appellee at 17—23, Gardner v. State, 286 Md. 520, 408 A.2d 1317 (1979).
65. This issue would arise regardless of whether the alleged conspirators were tried jointly or separately. In either circumstance, the guilt of both conspirators must be established before either can be convicted of conspiracy. *See* note 26 and accompanying text *supra*.
66. 9 Md. App. 346, 264 A.2d 119 (1970).
67. *Id.* at 355, 264 A.2d at 124.
68. Writing for the court, Chief Judge Murphy stated: "The essence of conspiracy is . . . a mental confederation involving at least two persons; the crime is indivisible in the sense that it requires more than one guilty person; and where the joint intent does not exist, the basis of the charge of conspiracy is necessarily swept away." *Id.* (citations omitted).
69. *Id.*
70. 41 Md. App. 187, 193—95, 396 A.2d 303, 307—09, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979).
71. Brief for Appellee at 14—16, Gardner v. State, 41 Md. App. 187, 396 A.2d 303 (1979).
72. MD. ANN. CODE art. 59, § 25(a) (1957) (emphasis added). Section 25(a) provides in pertinent part:

> A defendant is not responsible for criminal conduct and shall be found insane at the time of the commission of the alleged crime if, at the time of such conduct as a result of mental disorder, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

crime.[73] Therefore, an alleged conspirator found to have been insane under this prong would have been incapable of providing his portion of the joint criminal intent necessary to form a conspiracy.[74] Under the second prong of Maryland's insanity test, a defendant escapes punishment, not because he lacks the requisite criminal intent, but because he is not consciously able to refrain from engaging in the criminal conduct.[75] A conspirator found to have been insane under the second prong may have had the requisite criminal intent.[76] Therefore, his acquittal does not negate the existence of a conspiracy[77] and should not bar conviction of the sane co-conspirator.

The holding in *Regle*, that one who is legally insane is incapable of forming the intent necessary for conspiracy,[78] is overly broad because it fails to distinguish between the two prongs under which a conspirator may be found insane. Furthermore, the holding in *Regle* is now inconsistent with the dicta expressed by the court of special appeals in *Gardner* that one conspirator's conviction is not necessarily inconsistent with the other conspirator's acquittal by reason of insanity.[79] The court of appeals in *Gardner* should have addressed the issue of whether one of two alleged conspirators may be convicted when the other is found to have been legally insane at the time of the agreement. A ruling on this issue would have clarified the law and provided guidance to the Maryland trial courts. As a result of the court's failure to do so, final resolution of this question awaits a future decision by the Court of Appeals of Maryland.

### C. *Collateral Estoppel—An Alternate Defense*

The rationale underlying *Gardner*[80] applies with equal vigor regardless of the order in which the defendants are tried. Thus, after *Gardner*, the consistency rule will not preclude the conviction of a conspirator whose sole co-conspirator has been acquitted in an earlier trial. The *Gardner* decision, however, is not dispositive of whether the untried conspirator may raise the defense of collateral estoppel to bar his prosecution.[81]

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73. Gardner v. State, 41 Md. App. 187, 194—95, 396 A.2d 303, 308, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979).
74. *Id. But see* MODEL PENAL CODE § 5.04(1) (1962). Under the unilateral approach of the Model Penal Code, *see* note 26 *supra*, it is no defense that the person with whom the defendant conspired was legally insane at the time of the agreement.
75. Conn v. State, 41 Md. App. 238, 244, 396 A.2d 323, 327, *rev'd on other grounds*, 286 Md. 406, 408 A.2d 700 (1979).
76. Gardner v. State, 41 Md. App. 187, 195, 396 A.2d 303, 308, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979).
77. *Id.* at 194—95, 396 A.2d at 309.
78. 9 Md. App. 346, 355, 264 A.2d 119, 124 (1970).
79. 41 Md. App. 187, 194—95, 396 A.2d 303, 308, *aff'd*, 286 Md. 520, 408 A.2d 1317 (1979).
80. 286 Md. 520, 408 A.2d 1317 (1979). See text accompanying notes 47—50 *supra*.
81. The court of appeals in *Gardner* expressly refrained from addressing this issue. 286 Md. 520, 528 n.3, 408 A.2d 1317, 1322 n.3 (1979). Decisions on this precise issue are sparse because most courts have relied on the consistency rule, rather than collateral estoppel, to

Generally, when an issue of ultimate fact has been determined by a final and valid judgment, the defense of collateral estoppel may be raised to bar relitigation of the issue in a future action between the same parties.[82] Although the doctrine applies to criminal cases,[83] there are several reasons why collateral estoppel should not bar the prosecution of an alleged conspirator when his sole alleged co-conspirator has been acquitted. First, it will be difficult for the subsequently tried co-conspirator to satisfy all the required elements for applying the doctrine. Second, there are policy considerations for allowing the state to prosecute the remaining conspirator. Finally, after *Gardner,* the practical effect of permitting collateral estoppel in a conspiracy prosecution would be undesirable.

To assert the defense of collateral estoppel, a defendant must satisfy three elements: the issue sought to be litigated must be identical to one necessarily decided at a previous trial; the previous trial must have resulted in a final and valid judgment on the merits; and the previous trial must have been between the same parties.[84] In a conspiracy prosecution, the first requirement is easily satisfied. The issue involved in the remaining conspirator's trial—whether a conspiracy existed—will be identical to that previously litigated in the trial of the alleged co-conspirator. The second requirement also will be easily satisfied. An acquittal that is not based solely on a preliminary or procedural point generally will be a judgment on the merits.[85] Satisfaction of the identity of the parties requirement, however, would be impossible for an alleged conspirator who is basing his defense of collateral estoppel on the previous acquittal of his alleged co-conspirator.

Maryland,[86] along with the majority of other states,[87] has abandoned the identity of parties requirement in civil actions. Most courts have held that a party who had a full and fair opportunity to

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bar prosecution of an alleged conspirator whose only co-conspirator has been acquitted. *E.g.,* State v. Tom, 13 N.C. (2 Dev.) 371 (1830); Commonwealth v. Cambell, 257 Pa. Super. Ct. 160, 390 A.2d 761 (1978). Collateral estoppel was applied to bar prosecution in People v. Superior Ct., 44 Cal. App. 3d 494, 118 Cal. Rptr. 702 (1975). *Accord,* State v. Bruno, 333 F. Supp. 570, 575 (E.D. Pa. 1971). *Contra,* United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980); People v. Berkowitz, 50 N.Y.2d 333, 406 N.E.2d 783, 428 N.Y.S.2d 927 (1980).

82. *See* Pat Perusse Realty v. Lingo, 249 Md. 33, 35, 238 A.2d 100, 102 (1968); RESTATEMENT OF JUDGMENTS § 93 (1942).

83. Ashe v. Swenson, 397 U.S. 436 (1970); State v. Colbentz, 169 Md. 15, 180 A. 266 (1934).

84. *See* Cook v. State, 281 Md. 665, 669, 381 A.2d 671, 673 (1978); RESTATEMENT OF JUDGMENTS § 93 (1942); Note, *Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule,* 46 S. CAL. L. REV. 922, 925 (1973).

85. *See* Moodhe v. Schenker, 176 Md. 259, 267, 4 A.2d 453 (1939); BLACK'S LAW DICTIONARY 757 (5th ed. 1979).

86. *See* MCP, Inc. v. Kenny, 279 Md. 29, 34, 367 A.2d 486, 490 (1977).

87. *See, e.g.,* Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942); Ellis v. Crockett, 51 Hawaii 45, 56, 451 P.2d 814, 822 (1969); Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 451—55, 238 N.E.2d 55, 57—59 (1968).

litigate an issue may be estopped from relitigating the issue in a subsequent trial.[88] Thus, in a civil action, only the party against whom collateral estoppel is asserted must have been a party to the previous litigation.[89] The primary justification for abandoning the identity of parties requirement is the need to promote judicial economy by avoiding repetitious litigation.[90] Generally, the requirement has only been eliminated in civil actions.[91]

Abandonment of the identity of parties requirement in criminal cases[92] would permit an alleged conspirator to raise the defense of collateral estoppel when his sole alleged co-conspirator has been acquitted in a previous trial. Several reasons exist for allowing the state to prosecute the untried conspirator. First, the public interest in the enforcement of the criminal law outweighs any need for judicial economy.[93] In addition, there are several factors peculiar to criminal cases that may prevent the state from having a full and fair opportunity to litigate in the first trial. One such factor is that the scope of discovery in criminal cases is limited by court rules and by the Constitution.[94] Therefore, the state's ability to obtain evidence in support of its case is hindered.[95] Constitutional limitations such as the exclusionary rule may also prevent the state from presenting all of its proof in a particular case.[96] In addition, if a defendant is acquitted and the acquittal is contrary to the weight of the evidence, the state may not obtain a judgment notwithstanding the verdict[97]

88. *E.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

89. *E.g.*, Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942); Pat Perusse Realty v. Lingo, 249 Md. 33, 45, 238 A.2d 100, 107 (1968). Due process of law is satisfied when the party against whom collateral estoppel is asserted was a party to the previous litigation. Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d at 812, 122 P.2d at 894.

90. *See, e.g.*, MPC, Inc. v. Kenny, 279 Md. 29, 34, 367 A.2d 486, 490 (1977).

91. Note, *Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule*, 46 S. CAL. L. REV. 922, 941 (1973); *see* United States v. Standefer, 447 U.S. 10 (1980).

92. Because collateral estoppel is embodied in the fifth amendment guaranty against double jeopardy, it is constitutionally mandated when there is an identity of parties. Ashe v. Swenson, 397 U.S. 436, 442 (1970). Therefore, when a defendant who has been acquitted of a crime is subsequently tried on related charges, collateral estoppel precludes relitigation of issues decided at his first trial. *See id.* at 446–47.

93. In United States v. Standefer, 610 F.2d 1076 (1979), *aff'd*, 447 U.S. 10 (1980), the court stated:

> The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases. . . . To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interest of the courts, nor the public.

*Id.* at 1093.

94. Standefer v. United States, 447 U.S. 10, 22 (1980); *see* State v. Collins, 265 Md. 70, 78–79, 288 A.2d 163, 168 (1972); Kardy v. Shook, 237 Md. 524, 537, 207 A.2d 83, 90 (1965).

95. The purpose of discovery is to enable a party to prepare his case by acquiring information that will support his case and by ascertaining the nature of the evidence his opponent will present. *See* Williams v. Moran, 248 Md. 279, 291, 236 A.2d 274, 281 (1967).

96. Standefer v. United States, 447 U.S. 10, 23 (1980).

97. In criminal cases, a judgment notwithstanding the verdict would violate the sixth amendment right to a trial by jury. *See* U.S. CONST. amend. VI.

or a new trial.[98] Furthermore, the state, unlike a civil litigant, is denied the opportunity of appellate review.[99] Because of these factors, the state may not have had a full and fair opportunity to litigate the existence of a conspiracy in the first trial. Therefore, the state should not be precluded from relitigating the issue at the trial of the subsequently tried co-conspirator.

Finally, allowing the acquittal of one conspirator to bar the prosecution of another would be undesirable in light of the *Gardner*[100] decision. *Gardner* denies a conspirator the benefit of his co-conspirator's acquittal. It is precisely this benefit that collateral estoppel would afford a conspirator who is tried second. Therefore, the availability of collateral estoppel as a defense would encourage co-conspirators to seek delays in order to be the last brought to trial, with the hope that the previously tried conspirator will be acquitted. This type of strategic delay is an abuse of the judicial process and should be discouraged. Thus, when the issue is presented in Maryland, the Court of Appeals of Maryland should deny the defense of collateral estoppel to an alleged conspirator whose sole alleged co-conspirator has been previously acquitted.[101]

## VI. CONCLUSION

In *Gardner v. State,* the Court of Appeals of Maryland held that the rule of conspiratorial consistency does not apply to separate trials. The court reasoned that a guilty verdict delivered in the trial of one conspirator also concludes the guilt of the other for purposes of that trial. Because the verdict is inherently consistent, the consistency rule is inapplicable. The court, however, failed to take advantage of the opportunity provided by *Gardner* to clarify whether a

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98. A new trial, absent the defendant's consent, would violate the fifth amendment prohibition against double jeopardy. *See* United States v. Dintz, 424 U.S. 600 (1976); U.S. CONST. amend. V.

99. In Kepner v. United States, 195 U.S. 100 (1904), the United States Supreme Court ruled that the state's appeal of an acquittal violates the fifth amendment prohibition against double jeopardy. *See* U.S. CONST. amend V.

The Court of Appeals of Maryland has indicated a hesitancy to preclude a party from relitigating an issue when that party has not had the benefit of appellate review. In Cook v. State, 281 Md. 665, 381 A.2d 671 (1978), the court stated:

> Considerations of fairness would seem to require that a prior determination of fact or mixed law and fact should not normally be treated as final, and hence binding, in a subsequent proceeding against a particular party, where the party against whom preclusion is sought was denied the opportunity, as a matter of law, to have the disputed issue decided by an appellate court on direct review.

*Id.* at 675, 381 A.2d at 677. ***But see id.*** at 676—79, 381 A.2d at 677—79 (Eldridge, J., concurring).

100. 286 Md. 520, 408 A.2d 1317 (1979).

101. This would align Maryland with the position recently taken by the Supreme Court. In Standefer v. United States, 447 U.S. 10 (1980), the Court rejected the application of collateral estoppel to criminal cases absent an identity of parties and held that the acquittal of one defendant could not bar relitigation of that defendant's criminal conduct as an element in the prosecution of the second defendant. *Id.* at 2006—09.

conspirator may be convicted when his sole alleged co-conspirator is found to have been insane at the time of the agreement to conspire.

Another important issue remains after *Gardner*—whether collateral estoppel is available as a defense to an alleged conspirator whose sole alleged co-conspirator has been previously acquitted. To successfully assert this defense, an alleged conspirator must first convince the court to abandon the identity of parties requirement in criminal cases. Abandonment of this requirement is unwarranted because the state does not always have a full and fair opportunity to litigate. Furthermore, after *Gardner,* the availability of collateral estoppel would encourage an alleged conspirator to seek delays in order to be the last brought to trial. Allowing collateral estoppel in conspiracy cases therefore would result in an abuse of the judicial process.

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