holding completes the coverage of the Civil Rights Act of 1964 to include all bars.

CRIMINAL PROCEDURE—DOUBLE JEOPARDY—Retrial on greater charge after guilty plea to lesser included offense vacated held violative of fifth amendment double jeopardy clause.—*Rivers v. Lucas*, 477 F.2d 199 (6th Cir. 1973).

On October 19, 1970, an information was filed in the Recorder's Court for the City of Detroit, Michigan, charging Senarfis Rivers with the offense of murder in the first degree in the perpetration of a larceny. Three months later, Rivers entered a plea of guilty to the lesser included offense of manslaughter. This plea was accepted by the trial court and Rivers was sentenced to a term of not less than fourteen nor more than fifteen years in the state prison.

On March 23, 1972, the Michigan Court of Appeals reversed Rivers' conviction and remanded the case to the recorder's court.[1] Another information charging Rivers with perpetration of felony-murder, or murder in the first degree, was subsequently filed with the recorder's court. Upon exhaustion of his state remedies,[2]

---

[1]The sole authority cited by the court of appeals for the reversal was People v. Jaworski, 387 Mich. 21, 194 N.W.2d 868 (1972). This case held that prior to accepting the guilty plea of a defendant, the trial court must specifically inform the defendant of his constitutional rights against self-incrimination, to trial by jury, and to confront his accuser.

[2]The issue of exhaustion of state remedies was considered by the United States Court of Appeals, but is beyond the scope of this Recent Development. Prior to reaching the district court, Rivers filed a motion with the recorder's court to quash the information or to reduce the charge to manslaughter, and this motion was denied. He then filed four motions with the Michigan Court of Appeals: an emergency application for leave to appeal, a motion for immediate consideration of that motion, a motion for a stay of the order of the recorder's court, and a motion for immediate consideration of that motion. The court of appeals granted the motions for immediate consideration and denied the other motions. He then filed four motions with the Michigan Supreme Court: a motion for leave to appeal to the supreme court, a motion to by-pass the Michigan Court of Appeals, a motion for a stay, and a motion for immediate consideration. The

Rivers filed an application for a writ of habeas corpus in federal district court.[3] The district court granted the writ conditionally and ordered that Rivers be released from custody unless the state would reduce the charge on the information to "not more than manslaughter."[4] On appeal by the state, the United States Court of Appeals for the Sixth Circuit, in the case of *Rivers v. Lucas*,[5] affirmed the order of the district court.

In his application for a writ of habeas corpus, Rivers argued that in charging him anew with felony-murder, the state was placing him twice in jeopardy on that charge in violation of the fifth amendment to the United State Constitution.[6] The Sixth Circuit relied upon the United States Supreme Court case of *Green v. United States*[7] which held that when a jury had failed to find a defendant guilty of the crime charged and had convicted him of a lesser offense, the state could not again place the defendant in jeopardy on the greater offense following reversal of the conviction. The *Rivers* court concluded that for purposes of double jeopardy, there is no difference in effect between a jury's failure to convict a defendant and "a court's implicit refusal to do so"[8] when it accepts a plea of guilty to a lesser included offense. Therefore, for the state to charge Rivers a second time with first-degree murder was to place him twice in jeopardy for the same offense, in violation of the fifth amendment.

The cornerstone of the holding in *Rivers* was the decision of the Sixth Circuit Court of Appeals in the 1970 case of *Mullreed v. Kropp*.[9] That case began in 1954 when Joseph Mullreed was charged by information with armed robbery.[10] When

---

supreme court also granted the motion for immediate consideration and denied the other motions. Rivers v. Lucas, 477 F.2d 199, 200-01 (6th Cir. 1973).

[3]28 U.S.C. § 2254 (1970).

[4]Rivers v. Lucas, 345 F. Supp. 718, 719 (E.D. Mich. 1972).

[5]477 F.2d 199 (6th Cir. 1973).

[6]"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[7]355 U.S. 184 (1957).

[8]477 F.2d at 202.

[9]425 F.2d 1095 (6th Cir. 1970).

[10]MICH. COMP. LAWS ANN. § 750.529 (1948) states:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money

Mullreed stood mute, the court entered a plea of not guilty for him. One week later, the state entered an additional count of "robbery unarmed,"[11] and Mullreed entered a plea of guilty to this lesser offense without benefit of counsel. He was sentenced by the trial court to serve ten to fifteen years in the state prison. Because he had been convicted and sentenced without benefit of counsel, a federal district court granted his petition for a writ of habeas corpus,[12] and Mullreed was released from prison after having served nearly two years of his sentence.

Immediately upon his release, Mullreed was arrested by the state police. He was tried before a jury on the charge of armed robbery, and returned to prison under a sentence of fifteen to thirty years.[13] After spending eleven years exhausting his state remedies,[14] Mullreed turned to the federal courts. His petition for

---

> or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

See note 22 *infra* & accompanying text.

[11]MICH. COMP. LAWS ANN. § 750.530 (1948) states:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than fifteen 15 years.

Prosecutor Kenneth B. Johnson was uncertain whether a chair would constitute a dangerous weapon under the armed robbery statute. Mullreed v. Bannan, 137 F. Supp. 533 (E.D. Mich. 1956); *see* note 22 *infra* & accompanying text.

[12]Mullreed v. Bannan, 137 F. Supp. 533 (E.D. Mich. 1956). Gideon v. Wainwright, 372 U.S. 335 (1963), which would have required automatic reversal of the conviction, had not yet been decided. The district court relied instead upon Powell v. Alabama, 287 U.S. 45 (1932), employed a "totality of the circumstances" test, and found that Mullreed was badly in need of counsel at his trial. 137 F. Supp. at 538. Significantly, in granting the writ, Judge Picard gave no indication of what avenues of prosecution remained open to the state.

[13]425 F.2d at 1097. There is no indication that the count of unarmed robbery to which Mullreed had pleaded guilty two years earlier, was included in the second information.

[14]Mullreed filed a motion for a new trial, an amended motion for a new trial, a petition for writ of habeas corpus, which was denied by the Michigan Supreme Court, a motion to vacate judgment filed in the state

a writ of habeas corpus, based upon violation of the double jeopardy clause of the fifth amendment, was denied by the district court and Mullreed appealed that decision to the Sixth Circuit Court of Appeals.

After deciding that the fifth amendment applied to the state proceedings under attack,[15] the *Mullreed* court took note that under the Supreme Court's ruling in *Green,* if the defendant had been convicted of the lesser offense by a jury, the state would not be allowed to reinstate the court for the greater offense.[16] The court then reasoned that since under the statutes and court rules of Michigan[17] a trial court may not accept a plea of guilty if it has reason to doubt the truth of that plea, there is for double jeopardy purposes no essential difference between the jury verdict of guilty and the acceptance of a plea of guilty by the trial court.[18] By thus analogizing to the jury trial, the court concluded that the conviction of Mullreed for armed robbery was a violation of the double jeopardy clause.[19]

Basic differences exist between the reasoning used by the Sixth Circuit in *Mullreed* and the reasoning it later used in *Rivers*

---

trial court, and an application for leave to file a delayed appeal, which was also denied by the Michigan Supreme Court. *Id.*

[15]This was the first case in the Sixth Circuit to hold Benton v. Maryland, 395 U.S. 784 (1969), retroactive. *Benton* in turn was the first case to hold the fifth amendment's double jeopardy clause applied to the states through the fourteenth amendment. The Supreme Court left the issue of the retroactivity of *Benton* to the lower courts.

[16]425 F.2d at 1100. This was the explicit holding of the United States Supreme Court in Green v. United States, 335 U.S. 184 (1957). The Court offered alternative grounds for its holding in *Green*: 1) that the jury's failure to convict on the greater offense carried an implicit acquittal on that charge, or 2) that the jury was discharged, without the defendant's consent, and without having reached a verdict, thereby bringing to an end the defendant's jeopardy on the greater offense. *Id.* at 190-91. The former grounds were reaffirmed by a unanimous Court in Price v. Georgia, 398 U.S. 323 (1970).

[17]MICH. COMP. LAWS ANN. § 768.35 (1948); MICH. GENERAL COURT RULE 785.3(2).

[18]"We think the conviction and sentence necessarily show that the trial court found an evidentiary concurrence of the elements required for the conviction . . . ." 425 F.2d at 1100.

[19]The State of Michigan argued to no avail that the court's reasoning was erroneous in that the errors of the initial proceeding affected the fact-finding process, thus subjecting to question any finding that the defendant was unarmed. *Id.* at 1101. This argument was passed over and never really answered by the court.

v. Lucas, and these differences will be analyzed below. It should be noted at this point, however, that the *Mullreed* court went on to butress its holding with a construction of the statutes involved. The court concluded that the conviction for the lesser offense required a finding[20] that Mullreed was unarmed. Under the doctrine of collateral estoppel, such a judicial finding would bar a later prosecution for armed robbery.[21] The weight attributed to this reasoning by the *Mullreed* court is, of course, indeterminable, but it should be recognized that the *Rivers* court did not avail itself of this technique of statutory construction.[22] To the extent that the earlier decision relied upon such reasoning, the *Rivers* court arguably should have discounted *Mullreed*.

As previously stated, *Mullreed* provided the cornerstone for the *Rivers* decision. But much had happened in the years following 1970 to suggest that the Sixth Circuit might decide *Rivers* differently. Another circuit court of appeals had handed down an opinion with very strong dictum contrary to the *Mullreed* holding.[23] The Michigan Court of Appeals had rejected both the holding and the reasoning of the Sixth Circuit decision, and had explicitly refused to follow it.[24] Perhaps most importantly, the United States Supreme Court had seriously undercut the holding of the case.[25] Full analysis of the reasoning of *Rivers* requires examination of these additional influences.

---

[20]The court actually spoke of an "affirmative finding," thereby repeating its view that a trial judge, in accepting a guilty plea, is to perform to a large extent the fact-finding duties that a jury would otherwise perform in trial.

[21]425 F.2d at 1102. For a discussion of the doctrine of collateral estopped in criminal law, see Ashe v. Swenson, 397 U.S. 436 (1970); Schaefer, *Unresolved Issues in the Law of Double Jeopardy*, 58 CALIF. L. REV. 391 (1970).

[22]This might be a potential ground for distinguishing *Mullreed* from the *Rivers*-type case, in that under the construction by the Sixth Circuit of the Michigan statute, *see* notes 10, 11 *supra*, "robbery unarmed" is not in fact a lesser included offense of armed robbery. Rather they are mutually exclusive offenses. This distinction would seem unimportant in light of the decision in *Rivers*, however, because manslaughter is a lesser included offense of murder.

[23]Ward v. Page, 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

[24]People v. McMiller, 38 Mich. App. 99, 195 N.W.2d 801 (1972); People v. Harper, 32 Mich. App. 73, 188 N.W.2d 254 (1971).

[25]Santobello v. New York, 404 U.S. 257, 263 n.2 (1971).

At about the same time that the Sixth Circuit decided *Mullreed,*[26] the Tenth Circuit reached an opposite conclusion in the similar case of *Ward v. Page.*[27] Arly Ward had been charged with murder in 1947 in Tulsa County, Oklahoma, and was tried before a jury. After all the evidence was in, but before the case was submitted to the jury, Ward pleaded guilty to manslaughter in the first degree under an agreement with the county attorney and the trial court.[28] He was sentenced to a term of forty years in the state penitentiary. Ward appealed to the state and federal court systems[29] until a federal district court, finding the plea to have been involuntarily made,[30] granted a writ of habeas corpus.[31]

The State of Oklahoma chose to retry Ward on the original charge of first degree murder,[32] for which Ward was convicted and sentenced to life imprisonment. On appeal to the Oklahoma Court of Criminal Appeals, Ward raised the defense of former jeopardy. The court did not accept the argument as set forth

---

[26]*Mullreed* was decided on April 16, 1970, and the opinion was amended on May 4. *Ward* was decided on April 15, 1970, one day prior to *Mulreed,* and rehearing was denied on May 13, 1970.

[27]424 F.2d 491 (10th Cir.), *cert. denied,* 400 U.S. 917 (1970).

[28]Ward's attorney, the prosecuting attorney, and the trial judge represented to Ward that if he would plead guilty, the remaining portion (about fourteen years) of a twenty-five year sentence imposed upon him by another Oklahoma court for armed robbery would run concurrently with the forty-year sentence to be imposed upon him in the present case. The facts of the case may be found in Ward v. Page, 238 F. Supp. 431 (D. Okla. 1965). *See also* Ward v. Rainer, 360 P.2d 953 (Okla. Crim. 1961); Ward v. Page, 336 F.2d 602 (10th Cir. 1962); Ward v. State, 444 P.2d 255 (Okla. Crim. 1968); Ward v. Page, 424 F.2d 491 (10th Cir.), *cert. denied,* 400 U.S. 917 (1970).

[29]Ward received no relief through his appeal, Ward v. State, 210 P.2d 790 (Okla. Crim. 1949), then filed two petitions for habeas corpus with the Oklahoma Court of Criminal Appeals. Both were denied, the first without opinion. Ward v. Rainer, 360 P.2d 953 (Okla. Crim. 1961). His petition for habeas corpus to the proper federal district court was denied, but not reported, and on appeal to the Tenth Circuit Court of Appeals, he contested the voluntariness of his plea. That court remanded the case to the district court on the issue of voluntariness. Ward v. Page, 336 F.2d 602 (10th Cir. 1964). While the district court had heard evidence on the issue in the earlier proceedings, it had failed to rule on the issue.

[30]*See* note 28 *supra.*

[31]Ward v. Page, 238 F. Supp. 451 (D. Okla. 1965).

[32]Ward filed a plea to jurisdiction, a plea of acquittal of offense charged, and a motion to dismiss by reason of former jeopardy in opposition to this effort by the state. All were overruled by the trial court. Ward v. State, 444 P.2d 255 (Okla. Crim. 1968).

by Ward, but ruled instead that the state was estopped from enforcing a charge of murder against Ward on retrial. In other words, the state was to be held to its bargain. In reaching this conclusion, the court specifically limited its holding to the facts of the case, and stressed that each appeal would be considered on its own merits.[33] Rather than reverse the conviction and remand the case, however, the court decided that the jury, under proper instructions, had necessarily found Ward guilty on the manslaughter charge as well, and accordingly reduced the life sentence to forty years.[34]

On the second time around, Ward's petition for habeas corpus was denied by the federal district court, and Ward appealed that ruling to the Tenth Circuit Court of Appeals, where he again pressed his double jeopardy argument. That court rejected Ward's contention.[35] The basis of the court's decision was simple: a guilty plea to a lesser offense does not operate as an acquittal on all greater offenses because the implications of the plea are not the same as those of the jury verdict.[36] The court did not elaborate on this point, but the suggestion might be that the purpose of the inquiries by the trial court prior to accepting a guilty plea is the prevention of imprisonment of the innocent, rather than the prevention of insufficient punishment. Stated differently, the concern of the trial judge is the guilt of the defendant on the lesser charge to which he is pleading, not the defendant's guilt on the greater offense for which he might be punished if the plea is rejected.[37]

---

[33] *Id.* at 261

[34] *Id.*

[35] Ward v. Page, 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

[36]

> [U]nder these procedural facts it cannot be said that Ward was acquitted of the offense of first degree murder. It is true that a guilty plea is as final as a jury verdict but double jeopardy implications reverberating from a guilty plea and a jury verdict are not identical. In [Booker v. Phillips, 418 F.2d 424 (10th Cir. 1969)], it was plainly apparent from the instructions given to the jury that the verdict on the lesser included offense operated as an acquittal on the greater offense. But we have found no cases, and appellant alludes to no authority, which suggests that a guilty plea to a lesser offense operates as an acquittal on all greater offenses.

Id. at 493 (footnotes omitted).

[37] Another variation of this issue would deal with the competency, rather than the purpose, of the trial court to adjudicate the issue of guilt on the

The first reported case to arise in Michigan at the appellate level following *Mullreed* and *Ward* was *People v. Harper*.[38] In that case the majority of the Michigan Court of Appeals sided immediately with the Tenth Circuit's decision,[39] and upheld the validity of Harper's trial for first degree murder following vacation of his plea of guilty to manslaughter.[40] The opinion then expressed "total disagreement with the *Mullreed* opinion."[41] The state court accepted every contention made by the State of Michigan in *Mullreed*, and specifically rejected the Sixth Circuit's

---

greater charge. In Commonwealth v. Therrien, 269 N.E.2d 687 (Mass. 1971), the Supreme Judicial Court of Massachusetts said of a similar fact situation:

> Unlike the jury in the *Green* case, the judge here did not have the option to find the defendant guilty of first degree murder. . . . [W]e are of the opinion that acceptance by the judge of a defendant's plea to second degree murder does not constitute an inferential finding of not guilty of first degree murder for the purposes of double jeopardy. The question of guilt of first degree murder was one which the judge did not have the power to decide, and one which was never before him. Therefore the defendant was never placed in jeopardy by the judge's consideration of his guilty plea of anything more than that to which he pleaded guilty.

Id. at 690-91 (footnotes omitted). *Therrien* is distinguishable from the cases under consideration in two major respects. First, the defendant's sole ground for withdrawl of his plea was that he thought he could be found not guilty. *Id.* at 690. Thus, Therrien's initial conviction did not suffer from the constitutional infirmities present in *Rivers*, *Mullreed*, and *Ward*. Secondly, the Massachusetts court also presented the alternative ground of waiver for its rejection of Therrien's defense of former jeopardy. The problems which might plague the waiver theory in cases such as *Rivers* were absent in *Therrien*, wherein the trial judge had informed the defendant that if the plea were withdrawn, the defendant would again be subject to a first degree murder charge. *Id.* at 689. While the problems of voluntariness of such a waiver did not exist in *Therrien*, Rivers was never presented with such a warning.

[38]32 Mich. App. 73, 188 N.W.2d 254 (1971).

[39]*Id.* at 76-77, 188 N.W.2d at 256.

[40]Harper had tried to enter a plea of guilty to second degree murder, but after examination by the trial court, the court decided that Harper could be guilty of no more than manslaughter, and a plea of guilty to that charge was accordingly entered. That conviction was set aside due to the impropriety of the examination. Upon retrial, the defendant again entered a plea of guilty to second degree murder, and the plea was accepted by the trial court. *Id.* at 75-76, 188 N.W.2d at 256.

[41]*Id.* at 81, 188 N.W.2d at 258. This composed part "II" of the majority opinion, but actually expressed the opinion of only one of the three judges of the court, specifically Presiding Judge Gillis, who authored the opinion.

construction of the statutes involved.[42] A year later, the Michigan Court of Appeals specifically affirmed its attack on *Mullreed,* in *People v. McMiller.*[43]

Yet another potential influence on the *Rivers* court might have been dictum by the United States Supreme Court in *Santobello v. New York.*[44] This case related only peripherally to the issues of *Rivers,* yet might have lent strength to the position of the *Ward* court and the Michigan Court of Appeals. *Santobello* dealt with the voluntariness of a guilty plea entered under an agreement with the prosecutor, when the bargain was later ignored by a subsequent prosecutor.[45] The Court remanded the case to the New York courts to determine whether to allow Santobello to withdraw his plea or to grant specific performance of the plea arrangement. In a footnote to the majority opinion, however, Chief Justice Burger said, "If the state decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge . . . ."[46] This was, of course, dictum; but the Court, while not deciding the issue, would seem to have tacitly adopted the *Ward* position rather than that of the *Mullreed* court. Upon remand,[47] the New York Court of Appeals ordered specific performance of the agreement; thus, any potential double jeopardy issue was avoided. One dissenter on the New York court, however, would have allowed Santobello to plea anew to the original charge of two felonies.[48]

Judge Danahof concurred in part I, but not in part II of Judge Gillis' opinion: "It is not that I disagree with what Judge Gillis states in part II, but I do not believe it is necessary for a decision in this case." *Id.* at 82, 188 N.W.2d at 258-59. Judge Mahinske, a circuit judge sitting by appointment, dissented with an opinion, but significantly did not mention *Mullreed* in support of his position.

[42]*Id.* at 82, 188 N.W.2d at 258.

[43]38 Mich. App. 99, 195 N.W.2d 801 (1972).

[44]404 U.S. 257 (1971).

[45]The first prosecutor, in exchange for the guilty plea, agreed with the defendant to make no recommendation as to the sentence. The plea was accepted, and a series of postponements ensued, some of which were attributable to the defendant. Seven months later, Santobello stood ready for sentencing; a second prosecutor, who by this time had replaced the first and was apparently unaware of the agreement, recommended the maximum sentence of one year. *Id.* at 258-60.

[46]*Id.* at 263 n.2.

[47]People v. Santobello, 39 App. Div. 654, 331 N.Y.S.2d 776 (1972).

[48]*Santobello* was unique from the other cases discussed herein in that the relief Santobello requested was the opportunity to plead anew to the

It is clear, then, that an ample supply of precedent[49] and judicial reasoning existed for the Sixth Circuit Court of Appeals to reverse, or at least limit, its *Mullreed* holding if it so chose when it was confronted with *Rivers*. Instead, the court affirmed *Mullreed*, while apparently modifying the reasoning of that case to some extent. The court first pointed to the United States Supreme Court decision of *Price v. Georgia*,[50] which had been handed down shortly after the *Mullreed* decision, and implied that *Price* somehow supported the earlier position of the Sixth Circuit.[51] In *Price*, however, the Supreme Court dealt with a situation in which a jury had impliedly acquitted a defendant on the greater charges, rather than a trial judge's doing so. The *Mullreed* court had relied upon *Green* by analogy.[52] The Court in *Price* reaffirmed and clarified *Green*, but in doing so the Court in no way strengthened the analogy drawn by the *Mullreed* court. Thus, the implication in the *Rivers* opinion that *Price* in some manner supported the *Mullreed* position on former jeopardy stemming from plea arrangements would seem tenuous at best.

The *Rivers* court seemed to modify the reasoning of *Mullreed*, however, in that it no longer placed sole reliance upon the theory that the trial judge had rendered a decision regarding the guilt of the defendant on the greater charge. The court seemed to base its holding additionally on a theory of estoppel against the

---

original charges. After entering his plea, Santobello learned that much of the evidence against him had been obtained through an illegal search. 404 U.S. at 258. Thus, Santobello apparently believed that with that evidence excluded from trial he could win an acquittal on the felony charges against him without having to serve a year in prison in exchange therefor.

[49] *See* notes 27, 28, 29 *supra* & accompanying text. Other cases include strong dictum indicating support for the *Ward* result, for example:

> We have grave doubts as to Wells' pressing his motion for leave to withdraw his plea. If he is ultimately successful, we know of nothing to prevent the government from reviving the two counts which were dismissed by the trial judge.

United States v. Wells, 430 F.2d 225, 230 (9th Cir. 1970). *See also* United States *ex. rel.* Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971); Sanders v. State, 85 Ind. 318 (1882) (defendant who takes a new trial at his own request cannot claim that the former proceedings constituted a former jeopardy); People v. Taylor, 322 N.Y.S.2d 818, 821 (1971). *See generally* Comment, *Harsher Sentences on Re-Trial*, 38 TENN. L. REV. 562, 564-66 (1971); Annot., 75 A.L.R.2d 683 (1961).

[50] 398 U.S. 323 (1970).

[51] 477 F.2d at 202.

[52] *See* note 19 *supra*.

state: "there is implicit in a court's acceptance of a plea to an included lesser offense a determination that the right to prosecute the defendant on the more serious charge . . . has been relinquished."[53] This was the same approach used by the Oklahoma Court of Criminal Appeals in *Ward v. State*,[54] and rejected by the Tenth Circuit Court of Appeals in *Ward v. Page*.[55] The *Rivers* court did not totally abandon its earlier reasoning, however, as it again equated the actions of the trial judge with the actions of the jury.[56] When joined with the reference to the *Price* case, this analogy drawn by the court would seem to indicate that the Sixth Circuit has at least tacitly retained the "implied acquittal" logic of the *Mullreed* opinion. Thus, it would appear that the court based its decision in *Rivers* upon a combination of the theories of estoppel and acquittal.

The *Rivers* court concluded that the *Santobello* decision need not affect its action because the Supreme Court did not consider the potential double jeopardy plea in that case.[57] As noted above, this is technically a correct reading of the language in *Santobello*, albeit one which ignores the implications which could be drawn from the dictum in that opinion.

The Sixth Circuit noted the refusal of the Michigan Court of Appeals to apply the *Mullreed* decision, and quoted from the *Harper* opinion at length.[58] The court made no further comment upon these state court opinions other than to suggest that the attitude of the Michigan state courts would be considered a factor in determining whether a petitioner had exhausted his state remedies as required by the habeas corpus statute.[59]

The Sixth Circuit in *Rivers* also failed to respond anew to the arguments which had been made on behalf of the State of Michigan in the *Mullreed* case, but more disappointing was the refusal of the court to discuss its several points of disagreement with the

---

[53] 477 F.2d at 202.

[54] 444 P.2d 255 (Okla. Crim. 1968).

[55] 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

[56] 477 F.2d at 202.

[57] *Id.*

[58] *Id.* at 203.

[59] 28 U.S.C. § 2254 (1970).

Ward decision. The court simply acknowledged the existence of *Ward* and stated its adherence to *Mullreed.*[60]

Thus, the Sixth Circuit has reaffirmed its position that if a defendant enters a plea of guilty to a lesser offense, and is subsequently successful in vacating that plea, the state may not constitutionally retry him on the greater charge. In taking this position, the court seems to stand alone. The ramifications of the *Rivers* position upon the now-commonly accepted practice of plea-bargaining[61] might be great: the reluctance of prosecutors to offer, and of trial judges to accept, such "bargains" might increase drastically. Moreover, the logic of the *Rivers* position would seem to be untenable, particularly with reference to the "implicit acquittal" theory. It is apparent that while a trial judge is reluctant to accept a guilty plea from an arguably innocent defendant,[62] due to pressures of the docket he is likewise reluctant, if in fact able, to ascertain the fact of guilt or innocence of the defendant to charges other than those to which he is pleading. Moreover, one might question the competence of a trial judge to make a finding of fact on a question which is not before the court; in other words, as the Massachussets Supreme Court has pointed out,[63] only the issue of guilt on the lesser charge is before the court when the defendant enters his plea. The danger, if not the illogic, of the estoppel theory may be demonstrated by reversing the question, to wit: should the defendant not be estopped under the same theory from attacking the validity of his plea? Certainly the defendant, too, waives certain rights by accepting a bargain and pleading guilty.[64]

---

[60]"The Court has considered the arguments of appellants and the cases cited by them, including Ward v. Page . . . . We continue to adhere to our decision in Mullreed v. Kropp, *supra.*" 477 F.2d at 203.

[61]*See generally* Santobello v. New York, 404 U.S. 257, 263 (1971) (Douglas, J., dissenting); Carroway, *Multiple Offense Problems,* 1971 UTAH L. REV. 105.

[62]This is, of course, an understatement of the law. In Michigan, the trial judge is required to determine that there is a factual basis for the plea. *See* note 17 *supra.* Such is also the requirement in federal courts. FED. R. CRIM. P. 11. *See* North Carolina v. Alford, 400 U.S. 25 (1970).

[63]Commonwealth v. Therrien, 269 N.E.2d 687 (Mass. 1971). *See* note 37 *supra.*

[64]Boykin v. Alabama, 395 U.S. 238 (1969). *See* note 1 *supra.*