Fordham Law Review

Volume 60 | Issue 2 Article 6

1991

Double Jeopardy, Complex Crimes and Grady v. Corbin

Tat Man J. So

COMMENT

DOUBLE JEOPARDY, COMPLEX CRIMES AND *GRADY v. CORBIN*

TAT MAN J. SO

INTRODUCTION

IN 1990, Dana Defendant was arrested for and convicted of possession of drugs. In 1991, Dana Defendant was arrested again, this time for distribution of drugs. For this offense, however, Dana was acquitted at trial. Peter Prosecutor subsequently initiated prosecution under the Racketeer Influence and Corrupt Organizations ("RICO") statutes[1] against Dana Defendant, using the prior offenses of drug possession and drug distribution as "requisite predicate acts."[2]

The double jeopardy clause of the fifth amendment[3] mandates that no one shall be tried twice for the same offense.[4] Arguably, because Dana Defendant was prosecuted for the predicate offenses (drug possession and

1. *See* 18 U.S.C. §§ 1961-1968 (1988).

2. The major elements of proof for a RICO conviction are (1) the existence of an "enterprise" that is (2) connected to a "pattern of racketeering activity." Proof of the latter element is manifested by two or more "predicate acts." *See* United States v. Turkette, 452 U.S. 576, 583 (1981); *see also* 18 U.S.C. § 1961(1) (1988) (defining "racketeering activity"); *id.* at § 1961(4) (defining "enterprise"). These predicate acts are often criminal violations of other statutes, and are chargeable as such. *See, e.g.*, United States v. Boldin, 772 F.2d 719 (11th Cir. 1985) (defendant charged with RICO crimes, predicate narcotics offenses and conspiracies to commit the crimes), *cert. denied*, 475 U.S. 1048 (1986); United States v. Boylan, 620 F.2d 359 (2d Cir.) (defendant charged with RICO crime and predicate tax evasion crimes), *cert. denied*, 449 U.S. 833 (1980).

The recent rise in statutory offenses with provisions that overlap and duplicate other statutes ("complex crimes"), and the concomitant rise in multi-count indictments, have complicated double jeopardy analysis. *See* Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 279-80 (1965); Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 342 (1956) [hereinafter *Statutory Implementation*]; Note, *Double Jeopardy and the Multiple-Count Indictment*, 57 Yale L.J. 132, 132-33 (1947); Note, *Double Jeopardy and the Concept of Identity of Offenses*, 7 Brooklyn L. Rev. 79, 82 (1937); *see also* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970) (noting that with advent of complex statutes and creative prosecution, potential for unconstitutional reprosecution became more pronounced).

RICO is the quintessential complex crime, and will be used as the primary example in the following discussion. There are, however, other crimes that are "complex crimes." Examples include Continuing Criminal Enterprise ("CCE"), 21 U.S.C. § 848 (1988), incorporating the predicate drug offenses; felony-murder, incorporating the underlying felonies; and statutory conspiracies, incorporating the substantive criminal acts of the agreement.

3. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V, cl. 2.

4. *See* Green v. United States, 355 U.S. 184, 190 (1957); *see also* United States v. Jenkins, 490 F.2d 868, 870 (2d Cir. 1973) ("[T]he laws forbid the same man to be tried twice on the same issue.") (quoting 1 Demosthenes 589 (Vance transl. 1962 ed.)), *aff'd*, 420 U.S. 358 (1975). Discussing ancient English pleas, Blackstone refers to the double jeopardy protection as a "universal maxim . . . that no man is to be brought into jeopardy

drug distribution) and then tried for the RICO crime, she was subjected to several prosecutions for the same criminal acts and thus deprived of her constitutional protection against double jeopardy.[5] Nevertheless, separate prosecutions of the RICO crime and its predicate offenses have withstood constitutional challenges in the past on the ground that they are not the same "offense" within the meaning of the double jeopardy clause.[6]

The double jeopardy clause serves two functions, both of which should be considered when faced with a double jeopardy problem. One traditional function of the double jeopardy prohibition has been to prevent multiple prosecutions in more than one proceeding for the same conduct—in other words, to bar "successive prosecutions."[7] The purpose of this bar is to (1) ensure final resolution of substantive criminal issues; (2) protect against overzealous prosecutors; (3) safeguard against incorrect verdicts;[8] and (4) prevent the imposition of multiple punishments through successive prosecutions for essentially the same offense.[9] In addition, double jeopardy law seeks to prohibit multiple punishment for the

---

of his life more than once for the same offence." 4 Blackstone, Commentaries on the Laws of England 1019 (Chase ed. 1878).

5. *See generally* Thomas, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 Nw. U.L. Rev. 1359 (1984) (discussing double jeopardy problems in RICO prosecutions); Tarlow, *RICO Revisited*, 17 Ga. L. Rev. 291, 401-12 (1983) (same); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 257-64, 268-70 (1980) (same); *see also* Carlson v. State, 405 So. 2d 173 (Fla. 1981) (separate prosecutions of RICO and its predicate offenses are barred).

6. *See* cases cited *infra* note 62.

7. *See, e.g.*, J. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 27-33 (1969) (double jeopardy is "being tried a second time"); 1 J. Bishop, New Commentaries on the Criminal Law 727 (Zane & Zollman 9th ed. 1923) (defendant "exempt from any fresh prosecution" once in jeopardy).

8. *See* Note, *Twice in Jeopardy*, *supra* note 2, at 277-96 (1965); Sigler, *supra* note 7, at 156; *infra* notes 16-24 and accompanying text; *see also* Brown v. Ohio, 432 U.S. 161, 165-66 (1977) (noting other interests are involved in successive prosecution cases); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 84 (presenting three interests in double jeopardy: finality, avoiding double punishment and nullification).

Justice Black, speaking for the Court in Green v. United States, 355 U.S. 184 (1957), listed the three kinds of interests that the double jeopardy bar against successive prosecutions is designed to protect:

> The underlying idea, one that is deeply ingrained in [our] system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby [1] subjecting him to embarrassment, expense and ordeal and [2] compelling him to live in a continuing state of anxiety and insecurity, as well as [3] enhancing the possibility that even though innocent he may be found guilty.

Green, 355 U.S. at 187-88; *see also* Ohio v. Johnson, 467 U.S. 493, 498-99 (1984) ("[T]he bar [against successive prosecutions] ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence.").

9. *See infra* note 25 and accompanying text.

same offense in a single proceeding.[10] With complex crimes, however, courts recently have lost sight of the first three policy concerns underlying the bar against successive prosecutions, and instead have relied solely on the prevention of multiple punishment as the basis for applying double jeopardy principles.[11]

Grady v. Corbin,[12] decided by the Supreme Court during its 1989 Term, raises questions about this trend in the case law of successive prosecution. *Corbin* held that the protection against double jeopardy prohibits successive prosecutions if, to establish an essential element of the crime charged, the government would have to prove conduct that constitutes an offense for which the defendant had already been prosecuted.[13] In so holding, the *Corbin* opinion recognized that successive prosecution cases involve interests that do not arise in multiple punishment circumstances.[14] Perhaps the most profound implication of *Corbin* will be its impact on RICO prosecutions. Some RICO prosecutions would presumably violate the double jeopardy guarantee under *Corbin*'s conduct-based standard;[15] and, given the importance of RICO as a crime-fighting tool over the last decade, this result could have significant consequences.

This Comment examines the state of double jeopardy jurisprudence in light of *Corbin*, emphasizing *Corbin*'s potential impact on complex crimes such as RICO. Part I discusses the policies underlying double jeopardy doctrine and the two basic approaches to the problem of what constitutes the "same offense." Part II analyzes pre-*Corbin* judicial interpretation of RICO cases, and argues that successive prosecution case law with respect to complex crimes has unjustifiably broken with traditional successive prosecution case law developed in the context of simple crimes. Part III examines *Corbin* itself and discusses the policies underlying its holding. In addition, this section gives a broad overview of the implications of the *Corbin* decision and compares post-*Corbin* lower court decisions in RICO prosecutions. This Comment concludes that courts applying double jeopardy analysis to successive prosecutions involving complex crimes should look at the policies underlying the bar against successive prosecutions and use the *Corbin* decision as a guide to that effect.

I. BACKGROUND

A. *General Policies Underlying Double Jeopardy Jurisprudence*

Double jeopardy law protects four basic interests inherent in our crim-

10. *See infra* notes 26-27 and accompanying text.
11. *See infra* notes 62-82 and accompanying text.
12. 110 S. Ct. 2084 (1990).
13. *See id.* at 2087.
14. *See id.* at 2091-93.
15. *Cf.* Tarlow, *RICO Revisited*, *supra* note 5, at 405 ("Where two or more predicate offenses are prosecuted separately from the RICO offense, double jeopardy should bar separate prosecutions regardless of any legislative intent.").

inal justice system. First, defendants have an interest in resolving the issue of their guilt once and for all, rather than living with the "embarrassment, expense, . . . anxiety and insecurity" of repeated prosecutions.[16] Compared to other policy concerns of the double jeopardy clause, however, this interest in finality[17] is the least important, and "can be overridden by a strong and justifiable societal interest to the contrary."[18]

Preventing "the prosecutor from using criminal prosecutions to inflict unnecessary suffering upon defendants" addresses the defendant's interest in avoiding prosecutorial harassment.[19] When the prosecutor could have achieved his goal of conviction in one proceeding, separate trials may impose an unjustified hardship on the defendant.[20] Additionally, because a criminal prosecution imposes a significant emotional and financial burden on defendants and is hence a powerful prosecutorial weapon, allowing separate trials would increase the potential for government arbitrariness and tyranny.[21]

A third function of double jeopardy law is to preserve the jury's prerogative to resolve the factual issues of the case, especially when that resolution leads to a finding of innocence. When a defendant has been previously acquitted, a subsequent prosecution risks an "erroneous conviction" at the second trial.[22] The double jeopardy clause preserves the

16. Green v. United States, 355 U.S. 184, 187 (1957); *see also* Breed v. Jones, 421 U.S. 519 (1975) (state procedure of separate proceedings violated defendant's interest in finality because single prosecution could have served state's interest equally well).

17. *See* Westen & Drubel, *supra* note 8, at 84.

18. *Id.* at 161; *see also* Ohio v. Johnson, 467 U.S. 493, 498-99 (1984) (society's interest in law enforcement may supersede defendant's interest in finality); United States v. Tateo, 377 U.S. 463, 466 (1964) (same). For example, the prosecution is allowed one "full and fair opportunity" to prove the defendant's guilt. *See* Burks v. United States, 437 U.S. 1, 15-16 (1978). When the prosecution is denied that opportunity, society's interest in law enforcement can overcome the defendant's interest in finality. *See* United States v. Jorn, 400 U.S. 470, 483-84 (1971); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). *But see* Waller v. Florida, 397 U.S. 387, 394-95 (1970) (state's interest in vesting its prosecutors with sovereign authority to prosecute without regard to whether defendant was already tried by municipal prosecutor not sufficient to override defendant's interest in finality).

19. Note, *Twice in Jeopardy*, *supra* note 2, at 278. When the subsequent prosecution could have been resolved in the previous trial, initiating the later proceeding without justification constitutes prosecutorial harassment. *See id.* at 288; *see also* Palko v. Connecticut, 302 U.S. 319, 328 (1937) (state may not wear out defendant by multitude of trials). Constitutional joinder of all counts would be required at the first trial unless the government has some reasonable justification.

20. *See* Note, *Twice in Jeopardy*, *supra* note 2, at 286-88.

21. *See* McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1, 18 & n.19 (1983); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 964 n.15 (1980) [hereinafter *Bar to Reintroducing Evidence*]; *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) ("At the heart of [double jeopardy protection] is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression.").

22. Ohio v. Johnson, 467 U.S. 493, 499 (1984). When the defendant has been found

jury's authority to acquit and the defendant's opportunity to be acquitted by preventing subsequent convictions by other juries based on the same evidence,[23] thereby maintaining the *binding integrity* of acquittals.[24]

Finally, when a defendant has been convicted and punished for a particular crime, the double jeopardy bar against successive prosecutions safeguards against the danger that the defendant would be given additional punishment for that crime if convicted again.[25] The problem of multiple punishments, or multiplicity, also arises when the prosecution charges several statutory violations in a single proceeding.[26] If the defendant is given consecutive sentences for the same conduct under two different statutes, she may be deprived of her double jeopardy guarantee because she has been punished twice for the same offense, albeit in a single proceeding.[27]

An important distinction exists, then, between *successive prosecution* cases, which involve several proceedings, and *multiple punishment* cases, which involve only one proceeding. When the government prosecutes several statutory violations in a single proceeding, the defendant, although faced with the spectre of multiple punishment, is not confronted with the additional dangers inherent in successive prosecutions. The defendant's interest in finality of the issue is not implicated in a single proceeding because there is only one prosecution and hence a definitive resolution of the criminal issues. Furthermore, the singularity of the

---

guilty, an erroneous conviction is not an issue at the second trial because his guilt had already been adjudicated.

23. *See, e.g.*, Note, *Twice in Jeopardy*, *supra* note 2, at 280 ("Double jeopardy should guarantee that the defendant need convince only one jury of his innocence."); Westen & Drubel, *supra* note 8, at 122-23 (discussing interest of nullification after jury acquittal).

Moreover, a subsequent prosecution after acquittal would give the prosecutor a chance to refine his trial strategy by taking out the damaging and unnecessary evidence while compiling evidence to rebut the defense presented during the prior prosecution. *See* Westen & Drubel, *supra* note 8, at 161. Thus, the prosecutor has a better chance in convicting the defendant during the second prosecution. *See* Ashe v. Swenson, 397 U.S. 436, 447 (1970). Given that one jury has already acquitted the defendant, a later conviction would be unfair and potentially erroneous.

24. *Cf.* Note, *Twice in Jeopardy*, *supra* note 2, at 278 ("[T]he double jeopardy bar on reprosecution after an acquittal makes the status of innocence meaningful and minimizes the chance that innocent men will be convicted.").

25. *See* United States v. Wilson, 420 U.S. 332, 342-43 (1975). One commentator has argued that the idea behind successive prosecutions is solely to prevent the imposition of multiple punishment on the defendant. *See* M. Friedland, Double Jeopardy 195-204 *passim* (1969); *see also Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873) ("It is the punishment that would legally follow the second conviction which is the real danger guarded against by the [double jeopardy clause]."); *cf.* Note, *Twice in Jeopardy*, *supra* note 2, at 267 ("[T]he two rules [against successive prosecutions and multiple punishment] have a common core policy. They prevent prosecutors and courts from prosecuting and punishing arbitrarily, without legitimate justification.").

26. *See infra* notes 42-49 and accompanying text; *see generally* Comment, *Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause:* Whalen v. United States, 66 Cornell L. Rev. 819 (1981) (discussing multiple punishment issue).

27. *See* North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873).

proceeding prevents the prosecutor from utilizing different trials to hone prosecutorial skills and to harass the defendant. Finally, the defendant's risk of an erroneous conviction is not enhanced because there was no prior acquittal by the jury.

B. *Differing Approaches to the Definition of "Same Offense"*

The double jeopardy clause prohibits successive prosecutions[28] and multiple punishments[29] for the same offense. In determining when to apply the double jeopardy bar, courts have used two tests to define "same offense."[30]

The "same-transaction" test looks at the sequence of events triggered by the defendant's conduct—the "criminal transaction"—and requires that all charges arising from one criminal transaction be prosecuted together at a single trial.[31] Because the same-transaction test requires prosecution of all statutory violations of the crime in a single proceeding and hence precludes continued and consecutive prosecutions for the same offense, the test is an appropriate standard in dealing with successive prosecution issues. The same-transaction test is unsuited for multiple punishment cases, however, because it could define several statutory violations as the "same offense" and thereby require only one punishment for their violations, frustrating contrary legislative intent.[32]

In contrast, the "same-evidence" test focuses on the elements of criminal offenses as defined by the legislature and on the proof that the prosecution will put forth to satisfy those elements.[33] When the legislative elements and the required evidence of two statutes are distinct, prosecution under both statutes will not be prohibited.[34] With certain excep-

28. *See* Green v. United States, 355 U.S. 184, 190 (1957); United States v. Ball, 163 U.S. 662, 669 (1896).

29. *See Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1873); *see also* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (double jeopardy clause also protects against multiple punishment for the same offense).

30. *See* Note, *Bar to Reintroducing Evidence*, *supra* note 21, at 965; Note, *Twice in Jeopardy*, *supra* note 2, at 269.

31. *See* Ashe v. Swenson, 397 U.S. 436, 453-54 and n.7 (1970) (Brennan, J., concurring); Note, *Bar to Reintroducing Evidence*, *supra* note 21, at 967-68; Note, *Twice in Jeopardy*, *supra* note 2, at 275-76; *see also* Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973) (applying same transaction test); Kellett v. Superior Court, 63 Cal.2d 822, 48 Cal. Rptr. 366, 409 P.2d 206 (1966) (same).

32. *See* Note, *Twice in Jeopardy*, *supra* note 2, at 275 n.59; *cf.* Whalen v. United States, 445 U.S. 684, 689 (1980) (Congress has authority to create crimes and proscribe punishment for those crimes; double jeopardy clause only limits courts from overstepping bounds that Congress has created). Moreover, the application of the same-transaction test is made difficult by the varying definitions of "act" or "transaction." *See* Note, *Twice in Jeopardy*, *supra* note 2, at 275-77; Note, *Bar to Reintroducing Evidence*, *supra* note 21, at 968-69.

33. *See* Note, *Twice in Jeopardy*, *supra* note 2, at 270-73.

34. *See infra* notes 42-43 and accompanying text. In essence, the test defers to the legislature in defining criminal offenses. This, however, does not encompass the full parameters of double jeopardy protection. *See infra* note 38 and accompanying text.

tions,[35] federal courts prior to *Corbin* applied the same-evidence test in the context of both successive prosecutions[36] and multiple punishment.[37] Because it allows successive prosecutions so long as the legislative elements of the offenses are different and the prosecution introduces different sets of proof, however, the same-evidence test does not adequately address policies and circumstances underlying the fundamental double jeopardy bar against successive prosecutions.[38] As discussed below, the Supreme Court in *Corbin*, by rejecting the same-evidence test as the sole double jeopardy hurdle and adopting a conduct-based standard,[39] addressed this and other[40] inadequacies in modern federal double jeopardy jurisprudence.[41]

II. PRE-*CORBIN* JUDICIAL INTERPRETATION OF DOUBLE JEOPARDY AND RICO

A. *Multiple Punishment*

In *Blockburger v. United States*,[42] the Supreme Court enunciated the modern formulation of the same-evidence test by stating that where the same act may violate two different statutes, the two statutory offenses are not deemed the "same" if each requires proof of an additional fact that the other does not.[43] The *Blockburger* Court, facing the question of multiple punishment, characterized the issue as one of statutory construction rather than purely double jeopardy.[44] Under *Blockburger*, legislative intent to create different and separate crimes is manifested by the distinct sets of proof.[45] *Blockburger*, therefore, used the same-evidence test for

35. *See* cases cited *infra* note 38.

36. *See* Brown v. Ohio, 432 U.S. 161, 168 (1977); Gavieres v. United States, 220 U.S. 338, 342 (1911) (citing Morey v. Commonwealth, 108 Mass. 433 (1871)).

37. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

38. *See* Note, *Bar to Reintroducing Evidence*, *supra* note 21, at 966-67; *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 106-14 (1977); Sigler, *supra* note 7, at 222-28; Note, *Twice in Jeopardy*, *supra* note 2, at 273-75. Reference to a same-transaction test may therefore be appropriate. *See, e.g.*, Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977) (Brennan, J., concurring) (same-transaction test would bar successive prosecutions because both prosecutions concerned the same criminal acts, notwithstanding violations of different statutes); Ashe v. Swenson, 397 U.S. 436, 445-47 (1970) (collateral estoppel bars state from relitigating same issues in second trial, despite different evidence).

39. Grady v. Corbin, 110 S. Ct. 2084, 2089 (1990).

40. *See infra* notes 62-86 and accompanying text.

41. *See infra* notes 95-107 and accompanying text.

42. 284 U.S. 299 (1932).

43. *See id.* at 304. The same-evidence test was first applied in this country in Morey v. Commonwealth, 108 Mass. 433 (1871).

44. *See Blockburger*, 284 U.S. at 303-05. This is a judicial application of the *Ashwander* principle, where the court would resolve a case based on statutory construction rather than constitutional interpretation if possible. *See* Ashwander v. T.V.A., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *see also* NLRB v. Catholic Bishop, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available").

45. *See Blockburger*, 284 U.S. at 303-05. Moreover, the Court has held that Congress

the purposes of determining legislative intent rather than for the purposes of defining what offenses constitute the "same offense" within the meaning of the double jeopardy prohibition. Yet despite its self-defined role as a tool of statutory construction, the "*Blockburger* test" remained the standard for determining whether prosecution and punishment under two statutes would violate double jeopardy law.[46]

Because the *Blockburger* test centers on statutory construction and is hence a guide to legislative intent, subsequent case law has deemed its application unnecessary where legislative intent is unambiguous.[47] Clear evidence of legislative intent to permit separate punishment is dispositive of the multiple punishment issue, and rebuts any presumption that may arise from application of the *Blockburger* test.[48] This rule of deference to legislative intent has been applied consistently to both complex[49] and simple crimes when dealing with multiple punishment issues.

---

has the legislative authority to define crimes and proscribe punishment for their violations; and that, with respect to cumulative punishment, the double jeopardy clause does no more than prevent courts from imposing greater punishment than the legislature intended. *See* Whalen v. United States, 445 U.S. 684, 689 (1980); *see also* Missouri v. Hunter, 459 U.S. 359, 368-69 (1983) (courts may impose cumulative punishment where legislature specifically authorizes such punishment); *cf.* Ball v. United States, 470 U.S. 856, 861-64 (1985) (double jeopardy protection precludes conviction for receipt of firearms and possession of firearms because Congress did not intend to create double punishment by overlap in statutes).

46. *See* Jeffers v. United States, 432 U.S. 137, 151 (1977); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975); United States v. Cowartz, 595 F.2d 1023, 1029 (5th Cir. 1979).

47. *See supra* note 45 and accompanying text.

48. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 368-69 (1983) (where legislature specifically authorizes cumulative punishment under two statutes, court's task of statutory construction ends and it may impose cumulative punishment under such statutes in a single trial, regardless of whether those statutes proscribe "same" conduct under *Blockburger*); Albernaz v. United States, 450 U.S. 333, 340-41 (1981) (*Blockburger* test provides method of ascertaining legislative intent only when nothing more concrete is available); Iannelli v. United States, 420 U.S. 770, 785-86 & n.17 (1975) (*Blockburger* rule is only rebuttable presumption of legislative intent); *see also supra* note 45 (discussing congressional legislative authority to create crimes and proscribe punishment for those crimes).

49. *See, e.g.*, United States v. Licavoli, 725 F.2d 1040, 1049-50 (6th Cir.) (convictions and sentence for RICO crime and predicate crimes do not violate multiplicity aspect of double jeopardy because Congress intended separate offenses and punishment), *cert. denied*, 467 U.S. 1252 (1984); United States v. Hawkins, 658 F.2d 279, 287-88 (5th Cir. 1981) (same); United States v. Boylan, 620 F.2d 359, 361 (2d Cir.) (same), *cert. denied*, 449 U.S. 833 (1980); United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979) (same), *cert. denied*, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979) (same), *cert. denied*, 445 U.S. 946 (1980); *cf.* Whalen v. United States, 445 U.S. 684, 689 (1980) (Congress has authority to create crimes and proscribe punishment for those crimes; double jeopardy only functions to limit courts from overstepping bounds that Congress has created); *see generally* Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, *reprinted in* 1970 U.S. Code Cong. & Admin. News 1073, 1073 (purpose underlying RICO is to establish new penal prohibitions and provide enhanced sanctions to combat organized criminal enterprises).

B. *Successive Prosecutions*

1. Case Law Dealing with Simple Crimes: The "Greater and Lesser Included Offense" Doctrine

In *Brown v. Ohio*,[50] the Supreme Court extended the *Blockburger* formulation of the same-evidence test to apply to successive prosecutions of simple crimes.[51] In contrast to *Blockburger* and its emphasis on statutory construction, however, the *Brown* Court used the *Blockburger* same-evidence test for the purposes of defining the "same offense" without regard to legislative intent.[52] As such, the *Brown* decision impliedly acknowledged policy concerns[53] particular to successive prosecutions that *Blockburger*, which was solely concerned with a multiple punishment issue, ignored.

When all the elements of one offense are included in the greater set of elements of another offense, the former offense is a "lesser included offense" of the latter. Because proof of a lesser included offense requires no proof beyond that of the greater offense, the greater and lesser offenses are the "same offense" pursuant to *Blockburger*'s same-evidence standard.[54] Pursuant to this analysis, the *Brown* Court held that successive

50. 432 U.S. 161 (1977).

51. *See id.* at 166; *see also* United States v. Phillips, 664 F.2d 971, 1005-06 (5th Cir. 1981) ("The *Blockburger* test is the test for determining whether two offenses are the same for purposes of barring successive prosecutions as well as simultaneous prosecutions."), *cert. denied*, 457 U.S. 1136 (1982).

The *Brown* Court stated that "[i]f two offenses are the same . . . for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." *Brown*, 432 U.S. at 166. Although *Brown* used the same-evidence criterion in the context of successive prosecutions, the effect of the decision may be an incorporation of a same-transaction test into the facts of the case. *See, e.g.*, *Brown*, 432 U.S. at 170 (Brennan, J., concurring) (advocating application of same-transaction test); Westen & Drubel, *supra* note 8, at 163 ("If [*Brown*] was correctly decided, it was because the Court implicitly held that the Double Jeopardy Clause requires the State to join in a single prosecution all offenses that share the same factual core in common, at least where the common factual core is as great as that between joyriding and auto theft."). The opinion itself, however, adopts the same-evidence test as formulated by *Blockburger*. *See Brown*, 432 U.S. at 166. To the extent that a same-evidence test inadequately protects against successive prosecutions, *see supra* note 38 and accompanying text, the *Brown* decision recognized that inadequacy and states that there are some factual situations where successive prosecutions would be barred despite the analysis under *Blockburger*. *See Brown*, 432 U.S. at 166-67 n.6.

52. The *Brown* Court framed the question in double jeopardy terms rather than in statutory construction terms. *See Brown*, 432 U.S. at 164.

Traditional successive prosecution analysis, therefore, does not have a "deference-to-legislative-intent" restriction that is attendant with multiple punishment cases. *Cf.* Westen & Drubel, *supra* note 8, at 121-22 n.188 ("Although the Blockburger [test] operates as nothing more than a rebuttable presumption for purposes of multiple punishment, it may have a stricter and more rigid application in the context of multiple prosecution.").

53. *See supra* notes 16-24 and accompanying text.

54. *See Brown*, 432 U.S. at 168; *see also* Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (per curiam) ("the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one"); *In re* Nielsen, 131 U.S. 176, 188 (1889) ("a person [who] has been tried and convicted for a crime which has various incidents included in it, . . .

prosecutions and multiple punishment of "greater and lesser included offenses" are barred by the double jeopardy clause.[55] Foreseeing a problem in applying this doctrine to "greater offenses" that could not have been charged at the time of a previous indictment because certain elements of proof were lacking,[56] the *Brown* Court introduced an exception, under which successive prosecution would not be barred when all the events necessary for prosecution of the greater offense had not yet taken place or were not yet discovered.[57]

Subsequently, in *Illinois v. Vitale*,[58] the Supreme Court held that where proof of the greater offense does not *always* require proof of the lesser offense, the prosecution may withstand double jeopardy scrutiny.[59] The *Vitale* Court stated in dictum, however, that if the second prosecution in fact relies on proof of the lesser offense, the defendant would have a "substantial claim of double jeopardy."[60] The Supreme Court recently

---

cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence").

55. *See Brown*, 432 U.S. at 168. The *Brown* Court noted that *Blockburger* is not the only test to be applied in successive prosecution cases. "Even if two offenses are sufficiently different to permit the imposition of [multiple punishment], successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Id.* at 166 n.6. *Brown*, which speaks best for successive prosecution cases, is not affected by the Supreme Court's limitation of the *Blockburger* test because the limitation only concerned the multiple punishment issue. *See supra* notes 43-48 and accompanying text.

56. Complex crimes often fall into this category because they require multiple predicate offenses, and the second predicate offense may not occur until after the prosecution for the first predicate offense.

57. *See* Brown v. Ohio, 432 U.S. 161, 169 n.7; *see also* Diaz v. United States, 223 U.S. 442, 448-49 (1912) (greater offense prosecution of murder allowed after lesser offense prosecution of assault and battery, because victim died after prior prosecution). Such an exception is consistent with the policies underlying the bar against successive prosecutions. *See supra* notes 16-24 and accompanying text. There is little chance of prosecutorial misconduct and harassment because the missing elements are not within the control of the prosecution. An erroneous conviction of the second crime is unlikely because the first jury was not presented with the missing elements of proof which constitute that crime. The defendant's interest in finality is outweighed by society's interest that culpable persons should be punished for their crimes.

58. 447 U.S. 410 (1980).

59. *See id.* at 419.

60. *See id.* at 420-21. The *Vitale* Court apparently recognized the difference in applying the *Blockburger* standard in the abstract and on the specific facts of a case. An abstract application of the *Blockburger* standard warrants merely a reading of the statutes to determine whether they have the same requirements of proof. A fact-based application of the *Blockburger* standard necessitates a review of the actual proof the prosecution puts forth to satisfy those elements, and the double jeopardy bar operates where the prosecution essentially offers the same set of proof to meet the different statutory requirements. As such, a fact-based application of the *Blockburger* standard is more stringent, and a particular set of facts may pass *Blockburger* muster in the abstract but violate double jeopardy constraints when the prosecution proffers the identical facts in proving its cases. *See generally* Note, *Twice in Jeopardy*, *supra* note 2, at 269-70 (discussing difference between "required," "alleged" and "actual" evidence tests); *infra* notes 62-64 and accompanying text (criticizing abstract application of *Blockburger* in RICO cases).

adopted this dictum as holding in *Grady v. Corbin*.[61]

2. Case Law Dealing with Complex Crimes: A Statutory Construction Approach

With the advent of complex crimes, courts addressing the successive prosecution issue have adopted a different approach than that developed in the context of simple crimes. Pursuant to *Brown*, courts dealing with successive prosecutions of RICO and its predicate crimes have looked to *Blockburger*'s same-evidence test. These courts have misapplied the standard, however, by focusing solely on the legislative elements of the offenses and holding that RICO and its predicate acts are not the "same offense" because each *could* require proof of an additional element not included in the other offenses.[62] This does not follow from *Brown*'s logic, promulgated in the context of simple crimes, because proof of the predicate offenses is specifically incorporated into proof of the RICO offense.[63] As such, one offense does not have an additional element that the other

61. *See Grady v. Corbin*, 110 S. Ct. 2084, 2087 (1990). The facts of *Vitale* and *Corbin* are remarkably similar in that they both involve traffic offenses. *Compare Vitale*, 447 U.S. at 411-15 (1980) *with Corbin*, 110 S. Ct. at 2087-90.

62. *See, e.g.*, United States v. Grayson, 795 F.2d 278, 283 (3d Cir. 1986) (RICO offense not the same as one of its predicate offenses because it requires proof of an "enterprise" and a second predicate act), *cert. denied*, 479 U.S. 1054 (1987); United States v. Schell, 775 F.2d 559, 568 (4th Cir. 1985) (RICO offense and predicate offense each requires different proof), *cert. denied*, 475 U.S. 1098 (1986); United States v. Boldin, 772 F.2d 719, 727 (11th Cir. 1985) (predicate acts and RICO offenses not the same), *cert. denied*, 475 U.S. 1048 (1986); United States v. Phillips, 664 F.2d 971, 1009 n.55, 1015 (5th Cir. 1981) (facts underlying prior convictions of predicate offenses can be used to support later RICO charge), *cert. denied*, 457 U.S. 1136 (1982); United States v. Aleman, 609 F.2d 298, 306-07 (7th Cir. 1979) (predicate act count and RICO count do not violate double jeopardy, at least where each requires, in part, different proof), *cert. denied*, 445 U.S. 946 (1980); United States v. Smith, 574 F.2d 308, 310 (5th Cir.) (prosecution of RICO count requires proof of facts not required by predicate count and therefore does not violate double jeopardy clause), *cert. denied*, 439 U.S. 931 (1978); *see also* United States v. Persico, 774 F.2d 30, 32 (2d Cir. 1985) (predicate offenses to which defendant pled guilty in first prosecution can be used in subsequent proceeding for RICO crime *continuing after* plea to prior offenses). *But cf.* Pandelli v. United States, 635 F.2d 533, 537-38 (6th Cir. 1980) (although statutes have distinct elements of proof in theory, government's reliance on same proof during trial makes violations of statutes the same offense, notwithstanding *Blockburger* construction).

Because successive prosecution cases also involve a multiple punishment issue, *see supra* note 25 and accompanying text, courts will have to address both aspects of double jeopardy violation in these cases. *See, e.g.*, Garrett v. United States, 471 U.S. 773, 777 (1985) (Court addressing successive prosecution issue, then turning to multiple punishment issue); *Grayson*, 795 F.2d at 282-83 (same).

63. *See, e.g.*, Carlson v. State, 405 So. 2d 173, 176 (Fla. 1981) (state RICO and its predicate acts are greater and lesser included offenses); Tarlow, *RICO Revisited*, *supra* note 5, at 405 ("The relationship of a RICO offense to the predicate offenses is clearly that of greater and lesser-included offenses. Predicate offenses are lesser included within [RICO] since the elements of these crimes must be established to prove the commission of the racketeering activity."); *see also* United States v. Thomas, 757 F.2d 1359, 1374 (2d Cir.) (Newman, J., dissenting) ("[T]he sweep of the RICO statute . . . require[s] more than analysis of the statutory elements; it require[s] analysis of the specific allegations in the case."), *cert. denied*, 474 U.S. 819 (1985).

lacks; RICO and its predicate acts are therefore "greater and lesser included offenses" based on strict application of *Brown* and *Vitale*.[64] More importantly, the courts, in an attempt to justify their holdings, have adopted multiple punishment analysis by emphasizing clear evidence of legislative intent to create a *new* crime when enacting RICO,[65] and consequently have provided a foundation for a blanket complex-crime exception.[66]

Given these analytical problems under simple crime rules, some courts have moved even further away from the simple crime approach to successive prosecution cases and have implied that there is an exception to successive prosecution double jeopardy analysis for complex crimes.[67] Perhaps the clearest, and most forceful, enunciation of this exodus came in the form of dictum made by the Supreme Court in *Garrett v. United States*.[68]

Garrett dealt with whether a Continuing Criminal Enterprise ("CCE")[69] charge and its predicate crimes were "greater and lesser included offenses," which would bar multiple punishment and successive prosecution for the CCE crime.[70] On the multiple punishment issue, the

64. *See supra* notes 50-60 and accompanying text; *supra* note 63.

65. *See Grayson*, 795 F.2d at 282; *Boldin*, 772 F.2d at 728-30; United States v. Licavoli, 725 F.2d 1040, 1049-50 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *Phillips*, 664 F.2d at 1009 n.55, 1015; *Aleman*, 609 F.2d at 306; United States v. Solano, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980). *But see* Tarlow, *RICO Revisited*, *supra* note 5, at 405 ("Where two or more predicate acts are prosecuted separately from the RICO offense, double jeopardy should bar separate prosecutions *regardless of any legislative intent*.") (emphasis added).

66. *See infra* note 67 and accompanying text.

67. *See Grayson*, 795 U.S. at 283; *Boldin*, 772 F.2d at 727-28; *Licavoli*, 725 F.2d at 1049-50; *Phillips*, 664 F.2d at 1015; *see also* United States v. Hawkins, 658 F.2d 279, 288 (5th Cir. 1981) (discussing difficulty when applying double jeopardy analysis in RICO statutes); United States v. Boylan, 620 F.2d 359, 361 (2d Cir.) (same), *cert. denied*, 449 U.S. 833 (1980); *cf.* Whalen v. United States, 445 U.S. 684, 708-09 (1980) (Rehnquist, J., dissenting) ("[T]he *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining 'compound' and 'predicate' offenses. . . . [M]ultiplicity of predicates creates problems when one attempts to apply *Blockburger*.").

68. 471 U.S. 773 (1985).

69. *See* 21 U.S.C. § 848 (1988). CCE is very similar to RICO in that it requires predicate acts as necessary elements of proof. *See Garrett*, 471 U.S. at 775-77; *see also* 21 U.S.C. § 848 (1988) (elements of the statute). Moreover, the legislative intent of CCE was to create a separate offense with additional punishment for engaging in a continuing "drug enterprise." *See Garrett*, 471 U.S. at 777-87. Thus, both the structure and the legislative intent of CCE are almost identical to that of RICO. *See supra* notes 1-2. Given that the Supreme Court has never specifically addressed the double jeopardy problems attendant to RICO prosecutions, the Court's resolution of this issue in the context of a CCE charge is particularly relevant to the discussion.

70. *See Garrett*, 471 U.S. at 775. The Supreme Court was faced with a similar issue in Jeffers v. United States, 432 U.S. 137 (1977), where the question posed was whether a conspiracy was a lesser-included offense of the CCE charge because it required no proof beyond that required by the CCE offense. *See Jeffers*, 432 U.S. at 149-50. The Court did not rule on the issue, however, finding instead that because the defendant demanded sepa-

Court held that Congress intended to permit multiple punishment for both the CCE crime and the predicate offenses and that such intent is dispositive of the issue.[71]

On the successive prosecution issue, the *Garrett* Court held that the separate prosecutions did not violate double jeopardy protection because the criminal conduct comprising the CCE charge went beyond the prior prosecution of the predicate offense.[72] The situation in *Garrett* therefore falls within the exception, noted in *Brown*, that successive prosecutions are not barred when additional facts arose after the first proceeding.[73]

The *Garrett* Court distinguished *Brown*'s "greater and lesser included offense" doctrine by stating that a complex crime such as the CCE charge "does not lend itself to the simple analogy of a single course of conduct" comprised of lesser included offenses.[74] Yet because the *Garrett* facts fit within the exception expressed in *Brown*,[75] its language pertaining to the inapplicability of *Brown*'s "greater and lesser included offense" doctrine to complex crimes is dictum. Indeed, another reading of *Garrett*'s dictum could suggest that because complex crimes often con-

---

rate trials for the two charges despite the government's attempt to consolidate the trials, the defendant was deemed to have waived his double jeopardy claim. *See id.* at 152, 154.

71. *See Garrett*, 471 U.S. at 793-95. Although the Court in *Jeffers* did not decide the "greater and lesser included offenses" issue, the Court nevertheless assumed for purposes of argument that the conspiracy offense was a lesser included offense of the CCE crime. *See Jeffers*, 432 U.S. at 148-50. The Court, however, went on to state that the "critical inquiry" for double jeopardy purposes is "whether Congress intended to punish each statutory violation separately." *Id.* at 155. The Court then concluded that Congress did not intend to punish both offenses separately. *See id.* at 155-58. *Jeffers*, therefore, may stand for the proposition that, even if one offense is a lesser included offense of a complex crime and separate prosecutions would thus be barred, where the issue is one of *multiple punishment* the dispositive question is still whether the legislature intended separate and cumulative punishment. Such a reading of *Jeffers* would restrict the "greater and lesser included offense" doctrine to *Brown*'s facts, namely successive prosecutions. *But see* Brown v. Ohio, 432 U.S. 161, 169 (1977) (double jeopardy "forbids successive prosecution *and cumulative punishment* for a greater and lesser included offense") (emphasis added).

72. *See Garrett*, 471 U.S. at 791-93; *see also* Diaz v. United States, 223 U.S. 442 (1912) (previous prosecution of assault and battery does not bar later prosecution of homicide when victim dies after first indictment); *cf.* United States v. Jorn, 400 U.S. 470, 483-84 (1971) ("the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense").

73. *See supra* notes 56-57 and accompanying text.

74. *See* Garrett v. United States, 471 U.S. 773, 788-89 (1985). Justice O'Connor acknowledged that separate prosecutions of the predicate offenses and the CCE crime may infringe upon the particular interests involved in the double jeopardy bar against separate prosecutions, but argued that it "does not leave the defendant unduly exposed to oppressive tactics by the Government." *Id.* at 798 (O'Connor, J., concurring). She stated that the defendant is protected from prosecutorial misconduct because "[a]ny acquittal on a predicate offense would . . . bar the Government from later attempting to relitigate issues" in a subsequent CCE prosecution. *Id.* Given the Court's recent decision in Dowling v. United States, 493 U.S. 342 (1990), however, that protection is somewhat in doubt. *See infra* notes 108-10 and accompanying text.

75. *See supra* notes 56-57 and accompanying text.

tinue after the predicate offense, application of *Brown*'s "greater and lesser included offense" doctrine could prove problematic. This problem, however, has already been addressed and resolved by the exception noted in *Brown*,[76] an exception within which the *Garrett* facts fall. Of those circuits that have dealt with successive prosecutions of RICO and its predicates before the *Corbin* decision, at least one court expressly carved out an exception to successive prosecution case law for complex crimes,[77] based squarely on *Garrett*'s dictum.

In *United States v. Grayson*,[78] the Third Circuit inferred that successive prosecution analysis developed in the context of simple crimes was not applicable to complex crimes.[79] Framing the "ultimate question of whether two offenses are the same [as] one of legislative intent,"[80] the *Grayson* court held that Congress intended to permit successive prosecutions of RICO and its predicate offenses.[81]

C. *The Statutory Construction Approach Analyzed*

In relying on legislative intent as dispositive of the successive prosecution issue, courts have adopted multiple punishment case law that does not address the policy implications[82] of successive prosecutions and have made an exception to traditional successive prosecution case law for complex crimes.[83] The courts' adoption of an approach promulgated in the context of multiple punishment for resolution of successive prosecution issues in complex crime cases ignores policies[84] that are inherent in successive prosecution questions.

Returning to the case of Dana Defendant posited at the outset of this

76. *See supra* notes 56-57 and accompanying text.

77. *See* United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987); *see also* United States v. Licavoli, 725 F.2d 1040, 1049-50 (6th Cir.) (in light of legislative intent, prior bribery conviction may be used as predicate of RICO charge), *cert. denied*, 467 U.S. 1252 (1984). *But cf.* United States v. Persico, 832 F.2d 705, 711 (2d Cir. 1987) (declining to resolve "this thorny issue"), *cert. denied*, 486 U.S. 1022 (1988).

78. 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

79. *See id.* at 281-282.

80. *Id.* at 282.

81. *See id.* at 282-83. This decision forms the basis of a later Third Circuit case, United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991), which held that *Corbin*, the most recent simple crime successive prosecution case, does not apply to complex crimes. *See infra* notes 125-28 and accompanying text. *Pungitore*'s complex-crime exception has since been adopted by other circuits. *See infra* note 129 and accompanying text.

82. *See supra* notes 16-24 and accompanying text.

83. The Supreme Court has also indicated that an exception for complex crimes is inappropriate. In Jeffers v. United States, 432 U.S. 137 (1977), the court of appeals had held that a prior Supreme Court case, Iannelli v. United States, 420 U.S. 770 (1975), created a "complex statutory crimes" exception to double jeopardy analysis of "lesser included" offenses. In dictum, the Supreme Court rejected this contention: "Contrary to the suggestion of the Court of Appeals, *Ianelli* created *no exception . . . to general jeopardy principles for complex statutory crimes.*" *Jeffers*, 432 U.S. at 151 (emphasis added).

84. *See supra* notes 16-24 and accompanying text.

Comment, the interests protected by the double jeopardy bar against successive prosecutions are present in her RICO trial.

Having paid the penalty for her drug possession conviction, and having been acquitted of her drug distribution charge, Dana would expect that the substantive issues as to those criminal acts have been resolved. Yet Dana Defendant finds that she must defend against a subsequent RICO charge that incorporates her previous offenses as predicate elements of proof. Consequently, Dana Defendant is being subjected to an additional trial for the same criminal acts, which contradicts any notion of finality implied by resolution of Dana's previous criminal proceedings.

Additionally, Peter Prosecutor could have added a RICO charge during the 1991 prosecution for drug distribution because he already had the required predicate acts to sustain the charge. The RICO issue would have been resolved in the earlier case and Dana Defendant would have been saved the unjustified hardship of a second prosecution.

Moreover, given that Dana Defendant was acquitted of the predicate drug distribution charge, an acquittal on the RICO charge in the same trial would have been likely because a RICO conviction requires proof of at least two predicate acts.[85] Instead, Peter Prosecutor would be able to evaluate his drug distribution case, gauge its strengths and weaknesses, and modify accordingly; in effect, he would be "treat[ing] the first trial as no more than a dry run"[86] for the subsequent RICO prosecution, thereby enhancing the risk of an erroneous conviction and undermining the integrity of a previous jury's acquittal.

Under the statutory construction approach adopted from multiple punishment case law, the subsequent RICO prosecution would not be barred because of clear congressional intent to separate RICO and its predicate offenses.[87] This approach, however, ignores Dana Defendant's other substantive interests and would permit an arguably unconstitutional RICO prosecution. By focusing on proof of the defendant's conduct that is put forth at subsequent trials, the *Corbin* standard[88] would prohibit the subsequent RICO prosecution against Dana Defendant and would more fully protect Dana's double jeopardy interests.[89]

85. *See* United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984). Moreover, merely proving two predicate acts is not enough. The court must also consider whether the predicate acts are sufficiently related to one another to form a pattern of racketeering. *See* United States v. Indelicato, 865 F.2d 1370, 1381 (2d Cir. 1989) (en banc); Note, *Bifurcated Jury Deliberations in Criminal RICO Trials*, 57 Fordham L. Rev. 745, 746 n.13 (1989); *supra* note 2.

86. Ashe v. Swenson, 397 U.S. 436, 447 (1970).

87. *See* Organized Crime Control Act of 1970, Statement of Findings and Purpose, *reprinted in* 1970 U.S. Code Cong. & Admin. News 1073, 1073.

88. *See infra* notes 95-100 and accompanying text.

89. *See infra* notes 148-54 and accompanying text.

III. *GRADY V. CORBIN*

In *Grady v. Corbin*,[90] Thomas Corbin was served with traffic citations for driving while intoxicated and failing to keep right of the median.[91] The county judge allowed Corbin to plead guilty to the traffic violations, unaware of the fact that a person Corbin had hit had died in the hospital.[92] After his subsequent indictment on vehicular homicide charges, Corbin raised the double jeopardy argument that he had previously been convicted of the lesser included offenses.[93]

A. *Decision and Dissents*

In a 5-4 decision written by Justice Brennan,[94] the Supreme Court held that double jeopardy prohibits successive prosecutions if, to estab-

90. 110 S. Ct. 2084 (1990).

91. *See id.* at 2087-88 (1990); *see also* Corbin v. Hillery, 74 N.Y.2d 279, 282-83, 543 N.E.2d 714, 715-16, 545 N.Y.S.2d 71, 72-73 (1989) (supplying further factual background).

92. *See Corbin*, 110 S. Ct. at 2088. The prosecutor present during the proceeding was also unaware of this fact, and thus did not bring it to the court's attention during the plea proceeding. *See id.* at 2089.

93. *See id.*; *see also* Corbin v. Hillery, 74 N.Y.2d 279, 284-85, 543 N.E.2d 714, 716-17, 545 N.Y.S.2d 71, 73-74 (1989) (lower court proceedings).

The New York State Dutchess County Court denied Corbin's motion, finding that his previous silence regarding the deaths of the victims to be a "material misrepresentation of fact," which, the county court reasoned, precluded him from asserting his double jeopardy claim. *See* Grady v. Corbin, 110 S. Ct. 2084, 2089 (1990). Corbin then sought a writ of prohibition to bar prosecution of all counts in the indictment. The Appellate Division denied the motion, but the New York Court of Appeals reversed, holding that prosecution of the vehicular manslaughter counts would violate the guarantee against double jeopardy because driving while intoxicated was a "lesser included offense of second degree vehicular manslaughter." *Id.* The court further barred the remaining counts because the prosecution would have to rely on proof of acts that were previously adjudicated against the defendant. *See id.* The court reasoned that it would contravene *Vitale*'s dictum that such a prosecution would result in a "substantial" claim of double jeopardy. *See id.*; *see also supra* notes 58-60 and accompanying text (discussion of *Vitale* holding and dictum). The Supreme Court granted certiorari, *see* Grady v. Corbin, 110 S. Ct. 362 (1989), and affirmed, *see Corbin*, 110 S. Ct. at 2095.

94. Because Justice Brennan, who wrote the 5-4 *Corbin* decision, is no longer with the Court, and because the decision had strong dissents, the *Corbin* holding may itself be in jeopardy. *Cf.* Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 Cardozo L. Rev. 1685, 1685 (1991) ("More openly than any other Justice sitting today, [Justice] Scalia is ready to reverse prior Supreme Court precedent."). A concrete example of the present Court's willingness to reverse prior precedent can be seen in Payne v. Tennessee, 111 S. Ct. 2597 (1991), which summarily overruled Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), two important Eighth Amendment cases concerning the admissibility of victim impact evidence in a capital sentencing proceeding. Dissenting from the majority opinion in *Payne*, Justice Marshall stated: "Power, not reason, is the new currency of this Court's decisionmaking. . . . Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did." *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting). Moreover, it is worthwhile to note that the Justices who were in the *Corbin* minority were in the *Garrett* majority, especially Chief Justice Rehnquist, who penned the *Garrett* opinion. Thus, apparent dictum from *Garrett* may in fact preclude application of *Corbin* to complex crimes in future cases.

lish an essential element of the crime charged, the prosecution must prove conduct that constitutes an offense for which the defendant had already been tried.[95] This has been deemed the "same conduct" test.[96] The Court further noted that a present prosecution bars a later prosecution of a "component offense"[97] if proof of all the elements of that component offense were required to prove the present prosecution.[98]

Corbin invoked a two-step inquiry for double jeopardy analysis. First, the reviewing court looks to the statute itself to determine whether the legislature in fact intended to create a separate crime. This is an adaptation of the *Blockburger* reasoning.[99] Second, and most significantly, the inquiry focuses on the *conduct* that the state must prove.[100]

Justice Brennan's majority opinion rejected New York State's argument that the *Blockburger* test is the only hurdle that has to be surpassed in successive prosecution cases,[101] reasoning that successive prosecutions raise concerns that multiple punishment cases do not.[102] Although the opinion cited these concerns in holding that successive prosecutions must satisfy something beyond the *Blockburger* test, at least one commentary notes that it failed to "elaborate on the significance of these concerns or on ways in which the *Corbin* rule is tailored to serve them."[103]

The *Corbin* opinion stated that a "technical comparison of the elements of the two offenses as required by *Blockburger*" does not ade-

95. *See Corbin*, 110 S. Ct. at 2087, 2093.

96. *See* Grady v. Corbin, 110 S. Ct. 2084, 2087 (1990); *see also* United States v. Gambino, 742 F. Supp. 855, 857 (S.D.N.Y.) (referring to test as a same-conduct test), *aff'd in part*, 920 F.2d 1108 (2d Cir. 1990). This name is somewhat misleading. The *Corbin* decision does not hold that the double jeopardy clause bars reprosecution of the "same conduct"; it holds that a subsequent prosecution would be barred where the State needs to prove the prior conduct as *part* of its case. *See Corbin*, 110 S. Ct. at 2087.

97. A "component offense" is the same as a "predicate offense" because they are crimes that make up a larger overall complex crime. This term is borrowed from language in the *Corbin* opinion. *See infra* note 98 and accompanying text. Indeed, the Court's recognition of component offenses contradicts any suggestion that *Corbin* was intended to apply exclusively to simple crimes. *See infra* notes 124-29 and accompanying text.

98. *See Corbin*, 110 S. Ct. at 2093 n.11.

99. *See* Grady v. Corbin, 110 S. Ct. 2084, 2090 (1990).

100. *See id.* at 2093. Notwithstanding the Supreme Court's continued admonition that the *Blockburger* test is only one of statutory construction, the language of the test shows that it *is* a same-evidence test because the test only allows prosecution of offenses that have distinct sets of proof. *Cf.* Whalen v. United States, 445 U.S. 684, 705 n.1 (1980) (Rehnquist, J., dissenting) (discussing elements of same-evidence test) (citing Morey v. Commonwealth, 108 Mass. 433, 434 (1871)); Note, *Twice in Jeopardy*, *supra* note 2, at 269-73 (same). Justice Brennan's emphasis that the *Corbin* test is not a same-evidence test is apparently a response to Justice O'Connor's dissent, which argued that *Corbin* is inconsistent with an earlier decision by the Court that rejected any reference to that test in double jeopardy analysis. *See infra* notes 108-11 and accompanying text.

101. *See Corbin*, 110 S. Ct. at 2092.

102. *See id.* at 2091-92.

103. *The Supreme Court, 1989 Term—Leading Cases*, 104 Harv. L. Rev. 129, 155 (1990). For a good discussion of how the *Corbin* rule protects the concerns arising from successive prosecutions, see *id.* at 155-57.

quately protect the interests particular to successive prosecutions.[104] The decision recognized that when the defendant has committed several offenses over the course of a single criminal transaction, successive prosecutions for each offense would be permitted under the same-evidence test because each offense has its own distinct set of proof.[105] The defendant, however, may be subjected to prosecutorial harassment and unjustified suffering by a series of separate prosecutions.[106] Furthermore, the defendant may suffer an enhanced risk of erroneous conviction because prior acquittal on one charge would not bar a subsequent prosecution on a related offense.[107] The *Corbin* opinion implicitly addressed these concerns by focusing on the conduct circumscribed by each offense and further by requiring prosecution of all conduct-related charges in a single proceeding.

Justice O'Connor dissented from Justice Brennan's reasoning, arguing that the opinion was inconsistent with the Court's earlier decision in *Dowling v. United States*.[108] In *Dowling*, the Court had held that use of the same evidence in a subsequent proceeding does not necessarily violate double jeopardy constraints.[109] The *Dowling* Court reasoned that collateral estoppel, which precludes relitigation of factual issues already decided, does not bar testimony that was previously used because the "prior acquittal did not determine [the] ultimate issue in the present case."[110] In her *Corbin* dissent, Justice O'Connor argued that the testimony in *Dowling* would have been barred by the *Corbin* test because it would "prove conduct that constitutes an offense for which the defendant had already been prosecuted."[111]

In a separate dissent in *Corbin*, Justice Scalia argued that the majority

104. *See* Grady v. Corbin, 110 S. Ct. 2084, 2093 (1990); *see also* Note, *Bar to Reintroducing Evidence*, *supra* note 21, at 966 (1980) (the same-evidence test "provides inadequate protection in cases of successive prosecutions"); Note, *Twice in Jeopardy*, *supra* note 2, at 274-75 (noting same-evidence test does not adequately protect certain interests); *cf.* Note, *Bar to Reintroducing Evidence*, *supra* note 21, at 968 (noting that common-law variation of same-transaction test "reflects a sensitivity to the distinction between simultaneous and successive prosecutions left unaddressed by the same-evidence test").

105. *See, e.g.*, Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923) (75 successive prosecutions for 75 poker hands, each of which constitutes separate offense of gambling). *But see* Ashe v. Swenson, 397 U.S. 436 (1970) (subsequent prosecution for robbing one poker player barred after acquittal in previous prosecution for robbing another poker player in same game).

106. *See supra* notes 19-21 and accompanying text.

107. *See supra* notes 22-24 and accompanying text.

108. 493 U.S. 342 (1990); *see* Grady v. Corbin, 110 S. Ct. 2084, 2095 (1990) (O'Connor, J., dissenting).

109. *See* Dowling v. United States, 493 U.S. 342, 110 S. Ct. 668, 672 (1990).

110. *Id.* The import of the holding is that, for the defendant to claim collateral estoppel successfully, she must be able to prove that the issue previously adjudicated in her favor is the same as the issue in the current prosecution. *See Dowling*, 110 S. Ct. at 673-74.

111. *See Corbin*, 110 S. Ct. at 2095 (O'Connor, J., dissenting) (quoting language of the opinion).

opinion "depart[ed] from clear text and clear precedent"[112] in favor of *Vitale*'s dictum that a subsequent prosecution that relies on proof of the previously-prosecuted lesser offense would be barred.[113] In Justice Scalia's view, the double jeopardy clause does not protect the right against being twice put in jeopardy for the same conduct, but "guarantees only the right not to be twice put in jeopardy for the same *offense*."[114] Citing both textual[115] and historical[116] evidence, Justice Scalia argued that the double jeopardy clause has been interpreted to permit successive prosecution of different crimes based upon the same acts.[117]

Historical interpretation of the double jeopardy clause, however, is of limited utility in this context because, with the advent of complex, overlapping statutes in the criminal justice system, the possibility of unfair and unconstitutional re-prosecutions has significantly increased and dramatically changed.[118] Furthermore, the common-law practice of charging all relevant offenses in a single proceeding,[119] which would satisfy the requirements of the same-transaction test, has largely been abrogated.[120] Moreover, as Justice Brennan pointed out, Justice Scalia's "historic" examples of the Court's application of the *Blockburger* test in defining "same offense" concerned the permissibility of multiple punishment rather than successive prosecutions.[121] Rather than addressing the successive prosecution concerns of finality, protection against prosecutorial harassment and prevention of erroneous conviction, Justice Scalia concluded that the *Blockburger* test "reflected a venerable understanding" of the definition of "same offense."[122] The *Blockburger* test, which emphasized the predominance of statutory construction, does not protect the

112. *See Corbin*, 110 S. Ct. at 2096 (Scalia, J., dissenting).

113. *See* Illinois v. Vitale, 447 U.S. 410, 419-21 (1980); *supra* notes 58-60 and accompanying text.

114. *See Corbin*, 110 S. Ct. at 2096 (Scalia, J., dissenting). Such a narrow reading of the clause, however, is inconsistent with general jeopardy principles. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 164 (1977) ("It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the [double jeopardy] prohibition."); Note, *Twice in Jeopardy*, *supra* note 2, at 269 ("[T]he courts have never used such a narrow definition of offense. Most courts sense that the policies of double jeopardy embrace closely related or overlapping offenses as well.").

115. *See Corbin*, 110 S. Ct. at 2096-98 (Scalia, J., dissenting).

116. *See id.* at 2098-101.

117. *See id.* at 2096.

118. *See supra* note 2.

119. *See* Note, *Bar to Reintroducing Evidence*, *supra* note 21, at 967-68; Note, *Twice in Jeopardy*, *supra* note 2, at 266 n.13. At common law, the practice was difficult and there was little incentive for charging offenses arising out of the same transaction over several separate prosecutions. *See* Note, *Statutory Implementation*, *supra* note 2, at 342-43; Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 Yale L.J. 916, 918-20 (1958).

120. Moreover, the proliferation of overlapping statutory offenses has increased successive prosecutions. *See supra* note 2.

121. *See* Grady v. Corbin, 110 S. Ct. 2084, 2091 n.8 (1990).

122. *See id.* at 2100.

constitutional interests involved in avoiding successive prosecutions, however.[123]

B. *Implications of* Corbin *in RICO Prosecutions—Lower Court Responses*

Several circuits have disagreed as to whether *Corbin* bars successive prosecutions for both predicate crimes and the RICO crime.[124] The Third Circuit reasoned that RICO is a complex crime and found that Congress intended to create a separate crime with separate enhanced penalties.[125] Relying on *Garrett*'s dictum,[126] the Third Circuit held the *Corbin* decision inapplicable to RICO prosecutions,[127] and continued its statutory approach to resolution of successive prosecution problems in complex crimes.[128] The Eleventh Circuit has since agreed and has adopted the Third Circuit's approach to resolution of successive prosecution issues in RICO prosecutions.[129]

Case law in the Second Circuit is in some confusion. Initially, in *United States v. Calderone*,[130] the Second Circuit held that the *Corbin* opinion "was intended to guide double jeopardy analysis in *all* cases involving successive prosecutions."[131] Subsequently in *United States v. Gambino*,[132] however, the Second Circuit stated that *Corbin* applies only to simple crimes and conspiracies[133] and cited the Third Circuit decision with approval.[134] The court further noted that the principles in *Garrett* still apply to complex crimes.[135] Despite the ambiguity in the Second

123. Justice Brennan's same-conduct test addresses these concerns and is more suited to modern circumstances. *Cf. The Supreme Court, 1989 Term—Leading Cases*, 104 Harv. L. Rev. 129, 157 (1990) (advocating that Court must interpret double jeopardy under "current circumstances"); McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1, 1 (1983) (advocating that Court should "approach double jeopardy from a functional perspective").

124. *Compare* United States v. Pungitore, 910 F.2d 1084, 1010-11 (3d Cir. 1990) (noting *Corbin* does not apply beyond crimes involving "a single course of conduct"), *cert. denied*, 111 S. Ct. 2009 (1991) *with* United States v. Calderone, 917 F.2d 717, 721 (2d Cir. 1990) ("the Court's [opinion] suggest[s] that the [*Corbin*] test was intended to guide double jeopardy analysis in all cases involving successive prosecutions").

125. *See Pungitore*, 910 F.2d at 1108-09.

126. *See supra* notes 74-76 and accompanying text.

127. *See Pungitore*, 910 F.2d at 1110-11 & n.29.

128. *See id.*

129. *See* United States v. Gonzalez, 921 F.2d 1530, 1537 (11th Cir. 1991); United States v. Link, 921 F.2d 1523, 1529-30 (11th Cir.), *cert. denied*, 111 S. Ct. 2273 (1991).

130. 917 F.2d 717 (2d Cir. 1990).

131. *Id.* at 721 (emphasis added). *Calderone* also correctly addressed the underlying policies of the double jeopardy bar against successive prosecutions. *See id.* at 722.

132. 920 F.2d 1108 (2d cir. 1990).

133. *See id.* at 1112-13.

134. *See id.* at 1113; *see also* United States v. Scarpa, 913 F.2d 993, 1013-14 n.8 (2d Cir.) ("[W]e do not regard [*Corbin*] as precluding the proof of previously prosecuted conduct as predicate acts in a subsequent RICO prosecution."), *cert. denied*, 111 S. Ct. 57 (1990).

135. *See Gambino*, 920 F.2d at 1113. The actual holding of the *Gambino* court, however, was that the subsequent RICO prosecution was not barred because there were sev-

Circuit, the Tenth Circuit has since adopted the reasoning of *Calderone*[136] and held that *Corbin* "applies to all double jeopardy claims arising in the context of successive prosecutions."[137]

In addition, the Second and Third Circuits are in disagreement over whether a subsequent prosecution of the predicate offense is barred after acquittal on the RICO crime. The Third Circuit reasoned that racketeering "conduct" constitutes an offense distinct from the predicate offenses, and thus allowed a subsequent prosecution of the predicate offenses after a RICO acquittal.[138] The *Corbin* opinion, however, specifically stated that a subsequent prosecution of a "component offense" is barred if the government relied on proof of conduct constituting that offense in a prior proceeding.[139] The Second Circuit properly barred a subsequent prosecution of a predicate offense after an acquittal of a RICO charge, holding it to be "inconsistent" with *Corbin*'s reasoning.[140]

C. *Applying* Corbin *to RICO Cases*

For the most part, the circuit court opinions that have expressly or impliedly limited *Corbin* to "simple" crimes[141] are premised on language in *Garrett v. United States*.[142] Even though *Corbin* did not expressly overrule *Garrett*,[143] *Corbin* may have distinguished *Garrett* as standing

---

eral predicate acts that occurred after the initial prosecution. *See id.* Hence, the facts of *Gambino*, like the facts in *Garrett*, fall into the exception expressed both in *Brown* and *Corbin*, which allowed subsequent prosecutions due to the emergence or the discovery of additional facts. *See* Grady v. Corbin, 110 S. Ct. 2084, 2090 n.7 (1990); Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977); *see also* United States v. Farmer, 924 F.2d 647, 650 (7th Cir. 1991) (RICO prosecution not barred by *Corbin* test because additional necessary facts had not occurred by time of first predicate offense prosecution).

136. *See* United States v. Felix, 926 F.2d 1522, 1527-28 (10th Cir. 1991).

137. *See id.* at 1528 (quoting *Calderone*, 917 F.2d at 721).

138. *See* United States v. Esposito, 912 F.2d 60, 65 (3d Cir. 1990), *cert. dismissed*, 111 S. Ct. 806 (1991). *Esposito* is interesting for the additional reason that it acknowledged the underlying policies against successive prosecutions and, in contrast to another case in the same circuit, stated that "there is no exception from the Double Jeopardy Clause for complex statutory crimes." *Id.* at 62.

139. This is the converse of *Corbin*'s conduct-based standard and is articulated in the *Corbin* opinion. *See* Grady v. Corbin, 110 S. Ct. 2084, 2093 n.11 (1990). Indeed, *Corbin*'s reference to "component offense" contradicts any inference that the opinion was intended only to apply to simple crimes, because "component offenses" make up larger complex offenses.

140. *See* United States v. Russo, 906 F.2d 77, 78 (2d Cir. 1990) (per curiam).

141. *See* United States v. Gonzalez, 921 F.2d 1530, 1537 (11th Cir. 1991); United States v. Link, 921 F.2d 1523, 1529-30 (11th Cir.), *cert. denied*, 111 S. Ct. 2273 (1991); United States v. Gambino, 920 F.2d 1108, 1113 (2d Cir. 1990); United States v. Scarpa, 913 F.2d 993, 1013-14 n.8 (2d Cir.), *cert. denied*, 111 S. Ct. 57 (1990); *Esposito*, 912 F.2d at 62-64; United States v. Pungitore, 910 F.2d 1084, 1108-09 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991).

142. 471 U.S. 773 (1985).

143. *See, e.g.*, *Gambino*, 920 F.2d at 1113 ("[T]he principles underlying *Garrett* survive [*Corbin*]."); *Pungitore*, 910 F.2d at 1111 n.29 ("We dismiss out of hand the possibility that [*Corbin*] overruled *Garrett*. If the Supreme Court . . . intended to abandon *Garrett*, . . . it would have said so.").

solely for multiple punishment issues.[144] To the extent that there is tension between the two cases on the issue of successive prosecution, *Garrett* obviously is limited by the fact that it falls within the exception noted in *Brown* that would allow successive prosecutions when the greater offense continues after prosecution of the lesser offense.[145] *Garrett* itself did not create a blanket exception to double jeopardy law for complex crimes,[146] and nothing in *Corbin* indicates that the decision was intended to apply solely to simple crimes.[147]

Returning to the case of Dana Defendant, Dana claims a violation of her double jeopardy rights, as refined by the *Corbin* decision. Pursuant to *Corbin*'s conduct-based standard, her subsequent RICO trial is barred if it depended on proof of conduct constituting the previously-prosecuted drug offenses.[148] The first prosecution of the drug possession offense would not, however, prohibit the subsequent prosecution of the RICO case because the second predicate offense had not yet occurred at the time of the first trial.[149] Moreover, Peter Prosecutor may claim the same exception with respect to the later prosecution of the drug distribution crime, arguing that, by the time of that prosecution, he had not discovered facts constituting proof of the existence of a RICO enterprise in which Dana Defendant was involved. Assuming that Peter Prosecutor had adequate proof to charge a RICO offense during the second prosecution for drug distribution, however, application of *Corbin* would prohibit the subsequent RICO trial against Dana Defendant.

The *Corbin* opinion cited the relevant interests that need to be addressed in successive prosecution cases.[150] Application of *Corbin*'s broad conduct-based standard should therefore depend on the double jeopardy interests that are involved by the particular facts of each case.[151] Because finality is the least important interest and can be easily overridden,[152]

144. *See* Grady v. Corbin, 110 S. Ct. 2084, 2090-91 (1990). The *Corbin* opinion did not refer to *Garrett* during its subsequent discussion of the successive prosecution issue, except as a reference that the court has never adopted a same-transaction test. *See id.* at 2094 n.15.

145. *See supra* notes 56-57 and accompanying text; *see also supra* notes 74-77 (discussing tension between *Garrett* and *Brown*).

146. *See supra* notes 74-76 and accompanying text.

147. Moreover, the Court's reference to component offenses, which make up "complex crimes," implies that *Corbin was intended* to apply to both simple and complex crimes. *See Corbin*, 110 S. Ct. at 2093 n.11; *supra* note 97-98.

148. *See* Grady v. Corbin, 110 S. Ct. 2084, 2090 (1990).

149. *See id.* at 2090 n.7; Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977); *see, e.g.*, United States v. Farmer, 924 F.2d 647, 650 (7th Cir. 1990) (RICO prosecution not barred by *Corbin* test because additional necessary facts had not occurred by time of prosecution of first predicate offense); United States v. Gambino, 920 F.2d 1108, 1113 (2d Cir. 1990) (same); United States v. Pungitore, 910 F.2d 1084, 1110 (3d Cir. 1990) (same), *cert. denied*, 111 S. Ct. 2009 (1991).

150. *See supra* notes 101-06 and accompanying text.

151. Commentators have argued that application of the double jeopardy bar should turn on the underlying policies that are endangered by the specific facts of the case, rather than any hard and fast double jeopardy rule. *See supra* note 123.

152. *See supra* note 16-18 and accompanying text.

application of *Corbin* in RICO prosecutions turns on the dangers of prosecutorial overreaching and erroneous conviction. It is debatable whether Peter Prosecutor's actions could be termed "overreaching" and whether there are reasonable justifications for Dana Defendant's hardships in defending against a subsequent RICO prosecution. There is, however, a significant danger of error in undermining Dana Defendant's previous acquittal on one of the predicate offenses.[153] When a subsequent RICO prosecution depends on conduct that constitutes an offense for which the defendant has previously been *acquitted*, application of the *Corbin* holding is particularly important to guard against the risk of a bad verdict.[154] Given the criminal justice system's cardinal concern that an innocent person not be wrongly convicted, application of *Corbin*'s double jeopardy standard is fully justified when there has been a previous acquittal.

D. *General Implications of the* Corbin *Decision*

Aside from *Corbin*'s potential impact on successive prosecutions of complex crimes, the decision carries additional implications which should be noted.

Preliminarily, *Corbin* concerns successive prosecution cases, not multiple punishment cases.[155] Although *Corbin*, which dealt only with simple crimes, did not alter RICO multiple punishment analysis, the double jeopardy clause may still bar additional punishment for conduct for which the defendant had already been convicted.[156]

Second, *Corbin* adopts the exception noted in *Brown* that double jeopardy principles will allow successive prosecutions when the state was un-

153. *See supra* notes 22-24 and accompanying text.

154. There is a split in the circuits as to this contention, however. The Seventh Circuit allowed a subsequent RICO prosecution using predicate murder offenses for which the defendant was previously acquitted. *See* United States v. Farmer, 924 F.2d 647 (7th Cir. 1991). The Third Circuit allowed a subsequent prosecution of the predicate crime after the acquittal of the overarching RICO charge. *See* United States v. Esposito, 912 F.2d 60 (3d Cir. 1990), *cert. dismissed*, 111 S. Ct. 806 (1991). The Second Circuit, in contrast, barred a subsequent prosecution of the predicate offense after an acquittal on the overarching RICO charge. *See* United States v. Russo, 906 F.2d 77 (2d Cir. 1990) (per curiam).

155. *See, e.g.*, *Corbin*, 110 S. Ct. at 2090-91 (distinguishing successive prosecution issue from multiple punishment cases); United States v. McKinney, 919 F.2d 405, 417 n.13 (7th Cir. 1990) ("[b]y its own terms, [*Corbin*] only applies to subsequent prosecutions"); United States v. Ortiz-Alarcon, 917 F.2d 651, 654 (1st Cir. 1990) (*Corbin* "pertains only to successive prosecutions"), *cert. denied*, 111 S. Ct. 2035 (1991); United States v. Pungitore, 910 F.2d 1084, 1117 n.42 (3d Cir. 1990) ("[*Corbin*] was concerned with the double jeopardy implications of multiple prosecutions, which raise entirely different considerations than do consecutive sentences"), *cert. denied*, 111 S. Ct. 2009 (1991).

156. *See* United States v. Halper, 490 U.S. 435, 448-49 (1989) (holding that civil RICO penalty for conduct for which defendant had already been convicted violates double jeopardy clause). *See generally* Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* United States v. Halper, 76 Va. L. Rev. 1251 (1990) (discussing *Halper* and its potential impact on civil penalties and multiplicity claims).

able to proceed with the additional charge in the first prosecution because necessary additional facts had not occurred or had not been discovered at the time of the first proceeding.[157]

In addition, under *Corbin*'s same-conduct test, reintroduction of the testimony in *Dowling* would be barred because it tends to prove conduct that constitutes an offense for which the defendant was previously prosecuted.[158] Justice Brennan maintained that the same-conduct test did not encompass a same-evidence criterion, and that the double jeopardy clause precludes proof of conduct that constitutes an offense previously prosecuted rather than preclude reintroduction of the same evidence.[159] Notwithstanding Justice Brennan's argument, however, *any evidence* that tends to prove the previously-prosecuted conduct would be barred by *Corbin*'s broad test.[160]

It is also unclear what implications, if any, *Corbin* has on the dual sovereignty doctrine,[161] which is a general exception to double jeopardy law. Under the dual sovereignty doctrine, double jeopardy does not apply where the separate prosecutions of the same criminal acts were initiated by the state and federal governments, because both governments are sovereigns and independently have the power to establish criminal statutes and require punishment for their violation.[162] If a court is to apply the double jeopardy prohibition based on the relevant interests[163] involved, as implied in *Corbin*,[164] the dual sovereignty doctrine, which frustrates protection of those interests, should be reconsidered.[165]

---

157. *See* Grady v. Corbin, 110 S. Ct. 2084, 2090 n.7 (1990); Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977).

158. *See Corbin*, 110 S. Ct. at 2095-96 (O'Connor, J., dissenting); *see also The Supreme Court, 1989 Term—Leading Cases*, 104 Harv. L. Rev. 129, 157 (1990) ("In cases such as *Dowling*, *Corbin* may prevent the reintroduction of *any* evidence from a prior prosecution, because the very context required to establish relevance would often prove the previously prosecuted conduct.").

159. *See Corbin*, 110 S. Ct. at 2093 (Scalia, J., dissenting).

160. *See The Supreme Court, 1989 Term—Leading Cases*, 104 Harv. L. Rev. 129, 154 (1990).

161. The dual sovereignty doctrine is premised on federalism and the notion that the state and federal governments are separate sovereigns, "deriving power from different sources [and] capable of dealing with the same subject-matter [sic] within the same territory." United States v. Lanza, 260 U.S. 377, 382 (1922). In Abbate v. United States, 359 U.S. 187 (1959), the Court held that double jeopardy law does not apply in the context of successive state and federal prosecutions, stating that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Abbate*, 359 U.S. at 194 (quoting *Lanza*, 260 U.S. at 382); *see also* Bartkus v. Illinois, 359 U.S. 121 (1959) (state prosecution on same evidence after acquittal for federal offense does not violate double jeopardy clause). For a comprehensive discussion of the dual sovereignty doctrine, see generally Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. & Soc. Change 383 (1986).

162. *See Abbate*, 359 U.S. at 194.

163. *See supra* notes 16-24 and accompanying text.

164. *See* Grady v. Corbin, 110 S. Ct. 2084, 2091-93 (1990).

165. For example, the dual sovereignty doctrine would allow a federal prosecution after a state acquittal for the same criminal act. Given the high risk of an erroneous conviction, *see supra* notes 85-86 and accompanying text, the subsequent federal prosecu-

The *Corbin* decision's conduct-based standard admittedly presents problems in application, specifically with regard to what conduct constitutes an offense for which the defendant was previously prosecuted. Justice Scalia recognized this problem in his dissent,[166] and several courts have struggled with the definition of "conduct that constitutes" the previously-tried offense.[167] This ambiguity, however, does not diminish the need to refocus successive prosecution analysis on underlying policy concerns.

Finally, it is arguable that the defendant is necessarily engaging in the same acts or participating in the same conduct during "one criminal transaction."[168] Thus, *Corbin*'s same-conduct test is similar to the same-

---

tion arguably would violate the double jeopardy bar. This problem also exists in cases where one predicate crime underlying a complex federal offense has already been prosecuted by the state. Prior to *Corbin*, courts have held that a subsequent RICO prosecution based on predicate offenses previously tried by the state does not violate double jeopardy law on the ground that the two prosecutions were initiated by separate sovereigns. *See* United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), *cert. denied*, 444 U.S. 846 (1979). Current case law in the circuit courts suggests that *Corbin* does not change this contention. *See, e.g.*, United States v. Giovanelli, No. 89-1604, slip op. at 7580 (2d Cir. Sept. 13, 1991) ("[U]nder the dual sovereignty doctrine a federal indictment charging conduct that was previously the subject of a state prosecution . . . does not implicate the double jeopardy clause."); United States v. Farmer, 924 F.2d 647, 650 (7th Cir. 1991) ("Given the 'dual sovereignty' doctrine, . . . successive state and federal prosecutions for the same acts do not offend the [double jeopardy clause].").

166. *See Corbin*, 110 S. Ct. at 2102-04 (Scalia, J., dissenting).

167. *See, e.g.*, United States v. Calderone, 917 F.2d 717, 722-26 (2d Cir. 1990) (Newman, J., concurring) (discussing definition of "conduct" in prior conspiracy charge); United States v. Esposito, 912 F.2d 60, 65 (3d Cir. 1990) (prior RICO racketeering conduct constitutes offense different from predicate offense), *cert. dismissed*, 111 S. Ct. 806 (1991).

The definitional problems raised in *Corbin*'s conduct-based standard are similar to the definitional problems of the same-transaction test. Discussion and resolution of these problems in *Corbin*'s conduct-based standard is beyond the scope of the Comment.

168. For a number of years, Justice Brennan has been championing a same-transaction test for application in double jeopardy analysis. *See, e.g.*, Jones v. Thomas, 491 U.S. 376, 387-88 (1989) (Brennan, J., dissenting) ("the Double Jeopardy Clause requires, except in very limited circumstances, that all charges against a defendant growing out of a single criminal transaction be tried in one proceeding"); Borchardt v. United States, 469 U.S. 937, 940 (1984) (Brennan, J., dissenting from denial of certiorari) (advocating that double jeopardy clause mandates prosecution of all offenses arising from one "transaction" in a single prosecution); Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (Brennan, J., concurring) (same); Brown v. Ohio, 432 U.S. 161, 170 (1977) (Brennan, J., concurring) (same); Ashe v. Swenson, 397 U.S. 436, 453-54 & n.7 (1970) (Brennan, J., concurring) (same); *see also* Westen & Drubel, *supra* note 8, at 163 ("[Brennan's] argument . . . rests on the assumption that where the overlap in evidence is substantial, the State has no sufficient interest in separate trials that would justify the burden that successive prosecution imposes on a defendant's interest in finality."). This position has never been adopted by the rest of the Court. *See* Garrett v. United States, 471 U.S. 773, 790 (1985) ("We have steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause."); *see also* Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Harlan, J., concurring) ("I wish to make explicit my understanding that the Court's opinion in no way intimates that the Double Jeopardy Clause embraces to any degree the 'same transaction' concept reflected in the concurring opinion of [Justice] Brennan."). Moreover, commentators have

transaction test,[169] and serves most of its preclusive goals by forcing prosecution in a single proceeding of all possible charges that may arise.[170] By combining the *Blockburger* test of statutory construction with a conduct-based standard,[171] the *Corbin* holding incorporates the two traditional approaches to double jeopardy analysis—one emphasizing legislatively-defined offenses (a same-evidence test), and one focusing on the actual acts that the defendant committed (a same-transaction test).[172]

CONCLUSION

The prevalence of successive prosecutions attendant with overlapping and duplicitous offenses raises certain interests that *Blockburger*'s same-evidence test did not adequately address. The *Corbin* decision recognized the inadequacy of *Blockburger* in successive prosecutions and attempted to solve this problem by requiring the prosecution of all conduct-related charges in a single proceeding.

In addition, some courts facing the issue of successive prosecutions in complex crimes have adopted a statutory approach that originated in complex crime cases dealing with multiplicity issues. This statutory approach to the question of successive prosecutions should be discontinued because the judicial analysis that follows, as an exception for complex crimes, has disregarded the particular concerns that underlie the bar against successive prosecutions—namely, the interests of finality, protection against prosecutorial harassment and maintaining the integrity of a prior acquittal. These interests are as present in the context of complex statutory crimes as they are in the context of simple traditional crimes. Although limited exceptions may be appropriate in light of specific cir-

---

argued that the same-transaction test is analytically difficult. *See, e.g.*, Westen & Drubel, *supra* note 8, at 114 ("There is simply no way to make sense out of the notion that a course of conduct is 'really' only one act, . . . or . . . as many as one likes."); Note, *Twice in Jeopardy*, *supra* note 2, at 276 ("The principle shortcoming of [the] approach is that any sequence of conduct can be defined as an 'act' or a 'transaction.' An act or transaction itself determines nothing.").

169. *Cf. Corbin*, 110 S. Ct. at 2104 (Scalia, J., dissenting) ("We will thus have fully embraced [the] 'same transaction' theory.").

170. *See, e.g.*, Grady v. Corbin, 110 S. Ct. 2084, 2095 (1990) ("With adequate preparation and foresight, the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question."); *id.* at 2105 (Scalia, J., dissenting) ("[P]rosecutors . . . will be well advised to proceed on the assumption that the 'same transaction' theory has already been adopted."); *see also The Supreme Court, 1989 Term—Leading Cases*, 104 Harv. L. Rev. 129, 157 (1990) ("In practice, . . . the [*Corbin*] test may expand double jeopardy protection almost as far as the 'same transaction' test by encouraging joinder of all charges and creating an obstacle to the reintroduction of any evidence.").

171. *See supra* notes 99-100 and accompanying text.

172. *See supra* notes 28-38 and accompanying text. In practice, however, the legislative-intent part of the *Corbin* test is meaningless because a subsequent prosecution, even if it meets the *Blockburger* criterion, would have to pass constitutional muster under the conduct-based standard.

cumstances and the double jeopardy interests that are invoked, courts should at least address the relevant policy concerns in their resolution of successive prosecution issues. To that extent, the *Corbin* decision and its conduct-based test should be utilized to provide guidance for the courts.