UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 6 | Number 1 Article 9

Winter 1980

Extradition and Double Jeopardy: Will the Same Transaction Test Succeed in an International Context

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Extradition and Double Jeopardy: Will the "Same Transaction" Test Succeed in an International Context?

The United States Constitution guarantees that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb . . . ."[1] American courts first attempted to define the key phrase "same offense" in the 1871 case of *Morey v. Commonwealth*.[2] The *Morey* court set forth what has come to be known as the "same evidence" test for determining identity of offenses: "a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other."[3] Since *Morey*, the courts have struggled, with only partial success, to define the term "same offense" in a just and consistent manner.[4] The problem lies in retaining the Constitution's original purpose of protecting an individual from unfair harassment and double punishment in the face of the immense proliferation and specialization of substantive criminal law. This proliferation frequently creates a situation where a defendant will violate several different statutes in the course of a single criminal episode. He then may be separately tried and punished for each violation. A common variation of this problem occurs when a defendant violates a single statute several times in the course of a larger crime, as, for instance, by breaking into a home and robbing several occupants. In *Gusikoff v. United States*,[5] the Fifth Circuit recently dealt with yet a third type of situation. Defendants in *Gusikoff* violated nearly identical statutes of two countries, the United States and Great Britain. Although the facts of *Gusikoff* did not present the court with a difficult double jeopardy problem, the court's perception of what constitutes the "same offense," and the implications of its holding, are good indicators of the extent of the continuing definitional problem.

In March 1975, defendants in *Gusikoff* were charged with "conspir[ing] either to commit any offense against the United States, or to

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[1] U.S. CONST. amend. V, cl. 2.

[2] 108 Mass. 433 (1871).

[3] *Id.* at 434.

[4] *See generally*, M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 452-59 (1974); S. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE (1966).

[5] 620 F.2d 459 (5th Cir. 1980).

defraud the United States"[6] by conspiring to violate the mail[7] and wire fraud[8] statutes. The charges stemmed from defendants' activities between January 1972 and July 1973 in the perpetration of a fraudulent jewelry franchise scheme. Defendants had mailed false promotional literature as an inducement for prospective franchise purchasers. They pleaded guilty and were sentenced to two years imprisonment.[9]

In April 1979, the United Kingdom sought to extradite defendants[10] on substantially the same charges[11] as a result of defendants' operation between June 1973 and September 1975 of a British jewelry company. The charges focused on defendants' attempts to sell franchises through the distribution of fraudulent promotional literature. On appeal before the Fifth Circuit Court of Appeals, defendants alleged that the double jeopardy provision of the American-British Extradition Treaty[12] barred their extradition to England to face prosecution on these charges. They contended that the British offense was essentially the same offense for which they had already been prosecuted, convicted, and sentenced in the United States and that their extradition was therefore barred by Article V(1)(a) of the Extradition Treaty.[13]

The court faced no real definitional dilemma in finding defendants

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[6] 18 U.S.C. § 371 (1976).

[7] *Id.* § 1341.

[8] *Id.* § 1343.

[9] 620 F.2d at 463. Defendants were directed to serve only four months of the sentence and were placed on probation for the balance. *Id.* n.5.

[10] The extradition procedure under a bilateral treaty is begun by the filing of a complaint by the requesting nation in the U.S. jurisdiction where the defendant is found. The complaint charges the defendant with having committed one of the crimes enumerated in the treaty while within the jurisdiction of that nation. The magistrate or judge will then issue an arrest warrant for the individual in order to hold a hearing on the charges. 18 U.S.C. § 3184 (1976). The hearing is generally limited to four basic questions: 1) is this the individual wanted by the requesting nation; 2) is the evidence sufficient to show probable cause of the individual's guilt; 3) is the offense one of those included in the treaty; and 4) is there any bar in the treaty to the individual's extradition. 620 F.2d at 462; Garcia-Guillern v. United States, 450 F.2d 1189, 1191 (5th Cir. 1971). If the individual is found extraditable, the magistrate will certify to that effect and transmit a copy of the testimony to the Secretary of State for a final decision on the surrender of defendant. Defendant may not appeal a magistrate's decision, but may file a writ of habeas corpus with the district court, which is appealable if denied. 18 U.S.C. § 3184 (1976). *See also* 18 U.S.C. § 3186 (1976) (Secretary of State to surrender defendant to the foreign government); *id.* § 3190 (evidence permitted at the extradition hearing). Habeas corpus review is very limited, however, and cannot be used for purposes of a rehearing of the evidence presented to the committing court. 450 F.2d at 1192-93.

[11] Defendants were charged with violating the Theft Act of 1968, c. 60, § 15(1), which applies to one "who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it . . . ."

[12] Treaty on Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, Jan. 21, 1977, 28 U.S.T. 277, T.I.A.S. No. 8468 [hereinafter cited as Treaty]. Article V(1) of the Treaty states:

> Extradition shall not be granted if:
> (a) the person sought would, if proceeded against in the territory of the requested Party *for the offense for which his extradition is requested*, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State . . . . (emphasis added).

[13] 620 F.2d at 463.

extraditable under the Treaty. The two sets of charges were clearly not related to the "same offense" under any construction of that term. The court found that the American charges were based on a conspiracy to commit fraud, arising from the dealings of an American company, conducted exclusively in New York between 1972 and 1973. In contrast, the British charges were based on the substantive crime of fraud in the operation of a British company, perpetrated solely in Great Britain between 1973 and 1975. Although the two indictments resulted from the same type of criminal act, they clearly were not referring to the same acts.[14] The importance of *Gusikoff*, therefore, lies not in the holding itself, which was manifestly compelled by the facts of the case. It is rather the rationale underlying the holding—the way the court deals with the subtleties of the term "same offense"—that warrants close examination.

Morey was the first American decision to define "same offense" for the purpose of dealing with multiple prosecutions.[15] In *Morey*, defendant's earlier prosecution and conviction for unlawful cohabitation was held not to bar a later trial for adultery because the evidence necessary for conviction of the former charge was not sufficient to convict on the latter charge.[16] From this case arose the traditional "same evidence" test for determining identity of offenses, under which two offenses are different only if each statute violated requires proof of an additional fact not required by the other statute. In *Gavieres v. United States*,[17] the Supreme Court applied this test to uphold defendant's second conviction for the same indecent behavior in a public place.[18] Although based upon the same words and conduct as the first conviction, the second charge of insulting a public official required that the words be spoken to the official, an additional fact not necessary for the first, more general charge of drunkenness and indecent behavior in a public place.[19] In another major case, *Blockburger v. United States*,[20] the Supreme Court upheld its ear-

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[14] As the court notes, conspiracy and the substantive crime are always separate offenses; one dealing with the agreement, the other with the act itself. 620 F.2d at 464. *See* text accompanying note 69 *infra*.

[15] Morey v. Commonwealth, 108 Mass. at 434. There are two situations in which double jeopardy considerations may arise. The first is in a case of multiple punishment in the context of a single trial. This occurs when a defendant is punished separately for each count of a multicount indictment arising from a single act. The second situation arises where a defendant is prosecuted once for one aspect of his crime and then later reprosecuted for some other aspect of the same crime. *See generally* Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem*, 25 WAYNE L. REV. 825 (1979).

[16] 108 Mass. at 436.

[17] 220 U.S. 338 (1911).

[18] *Id.* at 343.

[19] *Id.* at 342. Justice Brennan, in his dissent in *Abbate v. United States*, 359 U.S. 187 (1959), maintains that the Supreme Court has never sanctioned the "same evidence" test in cases involving multiple prosecutions, and distinguishes *Gavieres* as a case occurring in the Philippines, "a territory with long-established legal procedures that were alien to the common law." *Id.* at 198 n.2.

[20] 284 U.S. 299 (1932). It should be noted that *Blockburger* deals with a question of multiple punishment, not multiple prosecution, where considerations of unfair harassment of the defendant are not present.

lier ruling in *Gavieres* by again finding that the proper test is whether each statutory provision charged requires proof of a fact that the other does not.[21] The durability of this test is apparent from holdings as recent as 1980 that still rely on the necessity of proof of an additional fact to find separate offenses in multiple punishment cases.[22]

Over the years, three different versions of the basic same evidence test have developed.[23] The first version is the "required evidence" test, which considers the evidence necessary under the statute to determine identity of offenses. *Blockburger* and most of the earlier cases use this test.[24] The second variation is the "alleged evidence" test, which considers the similarity of the allegations in the two indictments to determine if the evidence alleged creates one or more offenses.[25] The third test is the "actual evidence" test, which looks at the similarity of the evidence actually produced at the trials.[26]

Another approach to the "same offense" definitional problem that is becoming increasingly popular in modern cases began with the powerful dissenting opinion of Justice Brennan in *Abbate v. United States*.[27] The majority held that a state prosecution does not preclude a later federal prosecution for the same acts.[28] Their decision was based on firmly established precedent regarding separate state and federal sovereignty dating back to 1847.[29] Although the Court did not find it necessary to consider the question, the Government relied on the same evidence test for part of its argument and cited *Blockburger*.[30] The Government contended that the two indictments were not for the same offense because the federal charge required proof of an additional element for conviction not found in the state charge.[31] In his dissent, Justice Brennan noted that the Government's argument could easily be applied to successive

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[21] *Id.* at 304.

[22] *E.g.* United States v. Caston, 615 F.2d 1111 (5th Cir. 1980). Defendant was convicted simultaneously of transporting a stolen motor vehicle in interstate commerce and of concealing and selling the same motor vehicle, two offenses which the court found to "clearly require proof of different sets of facts." *Id.* at 1117.

[23] Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 269 (1965).

[24] *Id. See* Blockburger v. United States, 284 U.S. at 304.

[25] Comment, *supra* note 23, at 269. *See, e.g.*, In re Ryan, 360 F. Supp. 270 (E.D.N.Y. 1973); People v. Brannon, 70 Cal. App. 225, 233 P. 88 (1924).

[26] Comment, *supra* note 23, at 270. This test, however, forces a defendant to go through a second trial to determine whether the trial itself will be barred, a rather inconsistent result. The actual evidence test, despite its drawbacks, is still considered by some commentators the most effective of the three tests in preventing arbitrary reprosecutions, because a defendant cannot be reprosecuted on a different charge based on the same evidence. *See, e.g.*, People v. Martinis, 46 Misc. 2d 1066, 261 N.Y.S.2d 642 (1965).

[27] 359 U.S. 187 (1959).

[28] *Id.* at 195.

[29] *See, e.g.*, United States v. Lanza, 260 U.S. 377 (1922); Moore v. Illinois, 14 How. 13 (1852); Fox v. Ohio, 5 How. 410 (1847).

[30] 359 U.S. at 196-97 (Brennan, J., dissenting).

[31] *Id.* at 196 (Brennan, J., dissenting). The state charge was for conspiring to injure or destroy property of another; the federal charge was for conspiring to injure or destroy communications facilities of the United States. *Id.* at 187.

federal prosecutions based on the numerous and highly specific federal statutes, with dangerous constitutional implications for the fifth amendment protection against double jeopardy.[32] He therefore rejected the same evidence test completely, stating that "successive federal prosecutions of the same person based on the same acts are constitutionally prohibited, *even if the statutes require different evidence* . . . ."[33] Justice Brennan went on to emphasize that successive prosecutions would serve to wear out and harass a defendant contrary to the purpose of the fifth amendment clause against double jeopardy.[34] He ended by advocating a single trial for all offenses resulting from the same criminal act.[35]

The following year, in *Petite v. United States*,[36] the Justice Department, apparently heeding Justice Brennan's suggestion, discontinued prosecution of a defendant who had already been convicted at the state level for the same act.[37] In expressing what has come to be known as the "*Petite* policy," the Justice Department stated that the "general policy of the Federal Government" is "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions . . . ."[38] To that end, the Government has established the policy that "no federal case should be tried when there has been a state prosecution for *substantially the same act or acts* . . . without . . . demonstrating compelling Federal interests for such prosecution."[39]

In 1970, the Supreme Court decided *Ashe v. Swenson*[40] and added yet another dimension to the already confused set of criteria for determining "same offense."[41] The Court held that the doctrine of collateral estoppel is a rule of federal law embodied in the constitutional guarantee against double jeopardy.[42] Any issue, once litigated and decided in the defendant's favor at a previous trial, may not be relitigated, even if the two offenses are different.[43] Even more important for purposes of the holding in *Gusikoff* is the concurring opinion of Justice Brennan. In a much-quoted passage, Justice Brennan reiterated his position in the *Abbate* dissent[44] that the double jeopardy clause requires the prosecution to join at one trial all the charges against the defendant which grow out of "a sin-

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[32] *Id.* at 197 (Brennan, J., dissenting).

[33] *Id.* (Brennan, J., dissenting) (emphasis added).

[34] *Id.* at 198 (Brennan, J., dissenting).

[35] *Id.* at 200 (Brennan, J., dissenting).

[36] 361 U.S. 529 (1960) (per curiam).

[37] *Id.* at 530.

[38] *Id.*

[39] United States Attorneys' Manual § 9-2.142, *cited in* Sindona v. Grant, 619 F.2d 167, 178 (2d Cir. 1980)(emphasis added).

[40] 397 U.S. 436 (1970).

[41] A thorough discussion of the implications of *Ashe* is found in Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 AM. CRIM. L. REV. 259 (1978).

[42] 397 U.S. at 445.

[43] *Id.* at 443.

[44] *See* text accompanying notes 32-35 *supra*.

gle criminal act, occurrence or transaction."[45] From this passage emerged the "same transaction" test for determining identity of offenses. Much broader than the old same evidence test, the same transaction test requires joinder of all charges stemming from a single criminal transaction which the prosecution contemplates bringing.[46] The Court has not yet accepted this test as the majority position,[47] but a significant number of state courts have begun using "same transaction" language in deciding double jeopardy problems.[48]

One of the more important of the recent extradition cases dealing with a double jeopardy clause[49] is *Stowe v. Devoy*.[50] Defendant Stowe was convicted in New York of possession and sale of 100 pounds of hashish while on bail pending trial of a Canadian charge of conspiracy to import and importation of five and one-half pounds of hashish into Canada. After his U.S. conviction, Canada requested extradition of Stowe for trial on this charge. Stowe was held extraditable and filed a habeas corpus petition which was denied.[51] Stowe appealed the denial claiming that the double jeopardy clause of the American-Canadian treaty barred his extradition.[52] On appeal, the United States Court of Appeals for the Second Circuit found the two offenses in question to be different "under any of the commonly accepted tests used to define the 'same offense' . . . ."[53] The court went on to state that any previous charges against defendant must cover the same acts as those which were the subject of the extradition request.[54] In order for two sets of charges to refer to the "same offense" under *Stowe*, they must refer to the same act or acts and require the same evidence to prove each of them.

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[45] 397 U.S. at 453-54 (Brennan, J., concurring).

[46] *See id.*

[47] *See, e.g.*, Cecil v. United States, 444 U.S. 882 (1979) (Brennan, J., dissenting).

[48] *See* State v. Ahune, 52 Hawaii 321, 474 P.2d 1191 (1970); People v. White, 390 Mich. 245, 212 N.W.2d 222 (1973); State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972); Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973). *See also* 40 MINN. STATS. ANN. § 609.035 (West 1965)(statutory enactment of the same transaction test); N.Y. CRIM. PROC. L. § 40.20(2) (McKinney 1970)(same). The test also has been adopted by several national organizations, including the American Bar Association and the American Law Institute. *See* ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Joinder & Severance § 1.3 (Approved Draft 1968); ALI Model Penal Code § 1.07(2) (Proposed Official Draft 1962). Both documents refer to offenses "based on the same conduct or arising from the same criminal episode."

[49] Some examples of extradition treaties and their double jeopardy clauses are: Treaty on Extradition between the United States and Australia, May 14, 1974, art. VII(1)(a), 27 U.S.T. 957, T.I.A.S. No. 8234; Treaty on Extradition between the United States and Denmark, June 22, 1972, art. 7(1)-(2), 25 U.S.T. 1293, T.I.A.S. No. 7864; Convention on Extradition between the United States and Israel, Dec. 10, 1962, art. VI(1)-(2), 14 U.S.T. 1707, T.I.A.S. No. 5476.

[50] 588 F.2d 336 (2d Cir. 1978), *cert. denied*, 442 U.S. 931 (1979).

[51] *Id.* at 339.

[52] *Id.*

[53] *Id.* at n.6. *See* text accompanying notes 23-26 *supra*.

[54] 588 F.2d at 340. The court found that the double jeopardy clause had not been invoked by the extradition request because the charges were different (and required different evidence to prove each of them) and because the 100 pounds of hashish involved in the New York case was different from the five and one-half pounds that concerned the Canadian authorities. *Id.* at 339.

Recently, in *Sindona v. Grant*,[55] the Second Circuit greatly modified the view it had expressed in *Stowe*. Defendant in *Sindona*, a well-known Italian financier, was being sought by Italian authorities in connection with a giant bank fraud scheme and other related criminal activities. He previously had been charged in America with a large number of crimes ranging from conspiracy to mail fraud to embezzlement in connection with the same scheme. Defendant contended that, under the double jeopardy clause of the American-Italian Extradition Treaty, his extradition was barred by the existence of the American charges.[56] The Second Circuit refused to apply any of the commonly accepted tests, such as the *Blockburger* required evidence test that it had applied in *Stowe*, calling that test a "crabbed and wholly inappropriate reading" of the double jeopardy clause of the treaty.[57] Instead, the court said that the standard to be applied "should be at least as broad as that expressed in Mr. Justice Brennan's concurring opinion in *Ashe v. Swenson* . . . or in the *Petite* policy . . . ."[58] The court refused to find Sindona nonextraditable, however, because even under such a broad standard the court found no identity of the American and Italian offenses.[59] The court also noted that the same transaction test's goal of joining all claims at one trial would be impossible in this case due to principles of territorial jurisdiction which would prohibit an American court from trying Sindona for the bulk of his Italian crimes.[60] With *Sindona*, the Second Circuit rejected the commonly accepted same evidence or same acts test, at least in extradition cases, and endorsed a "modified and more flexible test of whether the same conduct or transaction underlies the criminal charges in both transactions."[61]

The decision in *Gusikoff* followed that in *Sindona* by less than three months. It provided the first opportunity for another circuit to follow the Second Circuit's lead in applying the same transaction test as the standard test in extradition cases. The Fifth Circuit in *Gusikoff*, however, chose to express its awareness of the broader standard advocated in *Sindona* merely in dicta, while rejecting its application to the facts before the court. The court summarily stated at the end of its opinion that the acts involved in *Gusikoff* did not "grow out of a single criminal act, occurrence, episode or transaction."[62] The court instead relied primarily on

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[55] 619 F.2d 167 (2d Cir. 1980).

[56] *Id.* at 172.

[57] *Id.* at 178. The court explained that "[f]oreign countries could hardly be expected to be aware of *Blockburger*; moreover, . . . in construing a double jeopardy clause in a treaty, embodying an ancient and widely recognized principle of civilized conduct, a court should not deem itself bound by a quiddity of the law of the requested party." *Id.*

[58] *Id.* at 179.

[59] *Id.* The court also took into consideration the assurances of the Italian government that defendant would not be prosecuted in Italy for the American transactions. *Id.* at 180.

[60] *Id.* at 179.

[61] *Id.* at 178.

[62] 620 F.2d at 464 (quoting Ashe v. Swenson, 397 U.S. at 453-54 (Brennan, J., concur-

Stowe and its interpretation of the same offense language,[63] an interpretation that the Second Circuit openly rejected in *Sindona*.[64] By relying on *Stowe*, the Fifth Circuit ignored an opportunity to become one of the innovators in this area.

The *Gusikoff* court's reliance on *Stowe*, however, is not really objectionable. The offenses in the two indictments seem to deal with clearly distinct acts or transactions under any test, whether it be the older, narrower *Stowe* test or the broader, more modern *Sindona* test. Therefore, application of the same transaction test would have made no difference to the outcome in *Gusikoff*. Further, the scope of the crimes involved in *Gusikoff* was so wide that application of the same transaction test would have effectively acquitted defendants of many of their crimes. This second consideration can be illustrated by the following hypothetical. Assume the alleged fraudulent American and British acts of defendants were all part of one giant international scheme to defraud investors in defendants' company, and defendants had already been convicted on the U.S. charges. Defendants now argue that because all the acts were part of the same transaction, their extradition is barred. All acts growing out of the same transaction constitute the same offense, and they may not be tried twice for the same offense under the Extradition Treaty. This situation is very similar to that in *Sindona*, and defendant in that case made a similar argument. Although the *Sindona* court adopted a standard as broad as Justice Brennan's in construing the double jeopardy clause, it found defendant's argument in that case unacceptable because it would broaden the standard beyond all reasonable limits, to the point where many elements of the one huge crime would go unpunished.[65] A similar situation would occur in any extradition case where some of the foreign crimes did not contain an "American element" sufficient to give a U.S. court jurisdiction over them. This situation creates one of the major difficulties with applying the same transaction test to an international case, especially one where a large proportion of the crimes are exclusively foreign. The conclusion to be drawn from the hypothetical is that, even if the crimes in *Gusikoff* had been considered part of the same transaction under Justice Brennan's test, the court still would have had no precedent for barring extradition on double jeopardy grounds.

An interesting situation would arise if in the above hypothetical defendants had been acquitted of defrauding the American investors, perhaps because of lack of evidence showing that defendants had conducted the scheme in the first place. Defendants then could argue that, aside from the same transaction bar to their extradition, the collateral estoppel rationale of *Ashe v. Swenson* prevents their retrial on the same issue of

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ring)). Indeed, the only mention of *Sindona* by the Fifth Circuit is found in a brief footnote at the end of its opinion. *See id.* n.6.

[63] *Id.* at 463; *see* text accompanying notes 49-54 *supra*.

[64] 619 F.2d at 178.

[65] *Id.* at 179.

perpetration of a fraud with regard to a different victim.[66] Unless the court again found the scope of the crime too broad and the possible repercussions too great to apply the doctrine of collateral estoppel, it seems that defendants would be immune from any further prosecution relating to the British investors. Pursuant to Article IX(1) of the Extradition Treaty, extradition will be granted only if the evidence is found sufficient "according to the law of the requested party" to bring the defendant to trial on the charges of the requesting party.[67] If the U.S. court finds that defendants did not engage in any fraudulent activity, under *Ashe* "[t]he federal rule of law . . . would make a second prosecution for the [same crime with regard to a different victim] wholly impermissible."[68] This result theoretically could immunize the foreign crimes from punishment by preventing the British courts from trying defendants for crimes against its citizens.

A final consideration, added by the *Gusikoff* court almost as an afterthought, is the notion of conspiracy versus substantive crime. As the court noted, it is a generally accepted principle that "the conspiracy to commit a crime and the crime itself are separate offenses" and conviction for one does not bar prosecution for the other.[69] Defendant's U.S. conviction for conspiracy to commit mail and wire fraud, therefore, would not bar a subsequent British prosecution for the substantive crime of fraud. Therefore, the court need not have resorted to any of the confused and inconclusive "same offense" tests to reach its holding. The court's reasons for nevertheless choosing to do so may rest on the involvement of an extradition treaty and consequent effect of its decision on a very sensitive area with international implications. Due to these factors, the court preferred to use as authority another extradition case, *Stowe*, instead of using a standard conspiracy versus substantive crime decision such as *Pinkerton v. United States*.[70] Another explanation for the court's reliance on the same offense tests is that the court wanted to expound upon the controversial definitions of "same offense." Following as it did on the

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[66] *See* text accompanying notes 40-43 *supra*.

[67] Treaty, *supra* note 12, at art. IX(1). Most of America's extradition treaties contain a clause stating that the determination of defendant's extraditability is to be made under the law of the requested party, which in the cases discussed in the text is the United States. *See, e.g.*, Treaty on Extradition between the United States and Italy, Jan. 18, 1973, art. X, 26 U.S.T. 493, T.I.A.S. No. 8052. Therefore, the criteria for determining whether the offense already tried is the same as that in the extradition request is a matter of American law.

[68] 397 U.S. at 445.

[69] 620 F.2d at 464. *See, e.g.*, Pereira v. United States, 347 U.S. 1 (1954); Pinkerton v. United States, 328 U.S. 640, 643 (1946) ("the plea of double jeopardy is no defense to a conviction for both offenses"); United States v. Ballard, 586 F.2d 1060, 1064 (5th Cir. 1978) ("acquittal on the substantive counts does not foreclose prosecution for the conspiracy").

[70] 328 U.S. 640 (1946). In *Pinkerton*, defendants were convicted for violations of the Internal Revenue Code. The indictment contained several substantive counts and one conspiracy count. Defendants urged, on certiorori to the Supreme Court, that the substantive counts had become merged in the conspiracy count, warranting a single sentence for the conspiracy only. The court affirmed the position that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Id.* at 643.

heels of *Sindona*, the case became a guinea pig for the international community to see whether the same transaction approach would be sustained in a second extradition case by another U.S. circuit. The Fifth Circuit, however, refused to accord anything but secondary importance to the new approach. The Fifth Circuit's tactic seems a reasonable one. The offenses involved in the case were not similar enough to warrant a step into practically unexplored territory—the case was easily and justly decided under the old rules. An important consideration here is that the Supreme Court has yet to grant or refuse certiorari to *Sindona*. The Supreme Court has not accepted the same transaction approach as a majority view and therefore a grant of certiorari to *Sindona* may yield some enlightening commentary on the matter. Until the Supreme Court addresses this issue, the Fifth Circuit appears content to remain with the commonly accepted tests for determining identity of offenses, at least, in cases like *Gusikoff*, where application of such tests creates no uncertain double jeopardy consequences.

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