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Double Jeopardy Clause of the Fifth Amendment--The Supreme Court's Cursory Treatment of Underlying Conduct in Successive Prosecutions

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THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT—THE SUPREME COURT'S CURSORY TREATMENT OF UNDERLYING CONDUCT IN SUCCESSIVE PROSECUTIONS

United States v. Felix, 112 S. Ct. 1377 (1992)

I. INTRODUCTION

In *United States v. Felix*,[1] the United States Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment does not bar the prosecution of substantive drug offenses, such as the manufacture and possession of methamphetamine, when the evidence used for such prosecution was introduced in a prior prosecution of the same defendant for different, but related, offenses. The Court decided that the prosecution of Felix for substantive drug offenses committed near Beggs, Oklahoma, between May 1 and August 31, 1987, was allowable under the Fifth Amendment since these charges were not the "same offense" as his previous conviction for attempting to manufacture methamphetamine in Missouri between August 26 and August 31, 1987. The Court rejected the Tenth Circuit's reversal of Felix's conviction, finding that the Court of Appeals read the Supreme Court's holding in *Grady v. Corbin* too broadly.[2] To bolster its ruling on this issue, the Court relied on *Dowling v. United States*[3] to find that introduction of relevant evidence of previously prosecuted misconduct is not the same as prosecution for that conduct.

In a divided opinion, the Court further held that the Double Jeopardy Clause does not bar the prosecution of a drug conspiracy offense when the conspiracy charge was premised on some of the

[1] 112 S. Ct. 1377 (1992).

[2] The court of appeals based its holding on the statement in *Grady* that double jeopardy bars consecutive prosecutions when the government tries "to establish an essential element of an offense charged in that prosecution." *See* Grady v. Corbin, 495 U.S. 508, 521 (1990).

[3] 493 U.S. 342 (1990).

same overt acts that served as the basis for a prior prosecution of the same defendant for substantive drug offenses. In reaching its decision on this issue, the majority relied on the long-standing rule that a conspiracy is different from a substantive crime and therefore, it is not precluded in a successive prosecution.

The concurrence averred that the conspiracy charge was not barred by the Double Jeopardy Clause because the overt acts that had been used in a prior attempt conviction of Felix did not meaningfully establish an essential element of the subsequent conspiracy charge. In reaching its conclusion, the concurrence relied heavily on the language of *Grady* that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[4]

This Note argues that the Court correctly allowed the government to prosecute Felix for the Oklahoma substantive drug crimes under the Double Jeopardy Clause, but that the Court's analysis failed to rectify the controversy created by its holding in *Grady*. Some courts and observers saw *Grady's* "same conduct" test as an enlargement of double jeopardy protection, while others were uncertain as to its import. *Felix* provided an opportunity for the Court to better define double jeopardy doctrine, but instead the Court in *Felix* muddled the issue even further.

As to the conspiracy charge, this Note argues that the majority's rule again failed to clarify the relevance of the *Grady* "same conduct" test. Furthermore, this Note proposes that the majority rule cannot provide defendants with sufficient constitutional protection. Consequently, this Note argues that the concurrence correctly suggested the type of adaptable rule necessary to satisfactorily protect defendants from complex, overlapping criminal statutes—a rule that relies on the Court's holding in *Grady*, and that makes a fact-specific inquiry into the defendant's conduct.

II. HISTORICAL BACKGROUND

The Double Jeopardy Clause of the Fifth Amendment states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."[5] As part of its scope, the Double Jeopardy Clause prohibits successive prosecution of defendants.[6]

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4 *Grady*, 495 U.S. at 521.

5 U.S. CONST. amend. V.

6 *Grady*, 495 U.S. at 516-18. Although not at issue in *Felix*, double jeopardy also

Successive prosecution occurs when the state tries the defendant for a criminal offense arising from the same criminal episode that served as the basis of a different offense for which the defendant was previously prosecuted.[7] In considering whether a violation of the Double Jeopardy Clause has occurred, the Supreme Court has historically utilized the test enunciated in *Blockburger v. United States.*[8] The *Blockburger* test involves a comparison of the statutory definitions of the two charges at issue.[9] Prosecution under each of the statutes is permitted under double jeopardy analysis as long as each provision of the statute requires proof of an additional fact which the other statute does not.[10] Conversely, if the provisions of one statute require proof of the same facts that the other statute requires, prosecution of the defendant under only one of the statutes is permissible under the Fifth Amendment Double Jeopardy Clause.[11]

Additionally, the Supreme Court's holding in *In re* Nielsen[12] has influenced double jeopardy analysis. Under the *Nielsen* test, "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."[13] In light of the *Nielsen* test, the Court has held it impermissible under the Fifth Amendment to "prosecute a person . . . for the same conduct even if the second offense is not, as a matter of law, included in the first."[14] The *Nielsen* rule is different from the *Blockburger* rule because the former rule was applied to successive prosecutions for the same "conduct" but under different statutes, while the latter rule was applied to consecutive punish-

protects defendants from consecutive prosecution in which the government tries the defendant for violating a statute and then retries him under the same statute, relying on different facts. *See* Amicus brief at 8, United States v. Felix, 112 S. Ct. 1377, (No. 90-1599)(1992)(citing Ashe v. Swenson, 397 U.S. 436 (1970); Mars v. Mount, 895 F.2d 1345 (11th Cir. 1990)).

7 Amicus brief, *supra* note 6, at 8-9.

8 284 U.S. 299 (1932).

9 *See* Anne Bowen Poulin, *Double Jeopardy:* Grady *and* Dowling *Stir the Muddy Waters*, 43 RUTGERS L. REV. 889, 892 (1991).

10 *Blockburger*, 284 U.S. at 304. The term "fact" or "facts", as used in the context of the Blockburger statutory test, refers to the elements of the offense enumerated in the statute's plain language. This is to be distinguished from the totality of the facts which comprise the defendant's conduct (i.e. the entire "criminal episode" that is serving as the basis for prosecution). *See generally* Amicus brief, *supra* note 6, at 13-22 (distinguishing between the elements of the *Blockburger* test and facts of a particular case).

11 *Blockburger*, 284 U.S. at 304.

12 131 U.S. 176 (1889).

13 *Id.* at 188.

14 Amicus brief, *supra* note 6, at 12.

ments; however, courts have used the two tests concurrently in double jeopardy analysis.[15]

In the late 1970s, the Supreme Court merged the *Blockburger* rule and the *Nielsen* rule to formulate a hybrid test for determining whether successive prosecutions would be permitted.[16] In *Brown v. Ohio*, the Court began its analysis with the *Blockburger* rule, holding that the two offenses at issue—the later auto theft offense and the previous joyriding offense—constituted the same statutory offense under the *Blockburger* test.[17] Consequently, the Double Jeopardy Clause barred the auto theft prosecution.[18] However, the *Brown* Court "[e]xplicitly . . . held that *Blockburger* was not the only test for deciding whether successive prosecutions would be permitted."[19] Had the *Blockburger* inquiry not been satisfied—that is, had the charged offenses contained statutory elements not common to each other—a second prong of the test would have utilized a *Nielsen* type of analysis. Under this prong, the Court "focuses on the facts of the case, rather than the elements of the statutory offense."[20] The *Brown* Court stated that "[e]ven if two offenses are sufficiently different [under *Blockburger*] to permit the imposition of consecutive sentences, successive prosecutions will [nonetheless] be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."[21]

The subsequent case of *Harris v. Oklahoma*[22] reaffirmed the two-prong test established in *Brown*. In *Harris*, the defendant was convicted of felony murder. In a later trial, he was tried for armed rob-

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15 *Id.* at 13-15 ("In a consecutive punishment situation, the question is not whether the defendant is being tried twice, but whether he may be punished twice for the same offense"). While it is important to distinguish consecutive punishment, the focus of this Note is successive prosecution.

16 *See, e.g.*, Brown v. Ohio, 432 U.S. 161 (1977); Harris v. Oklahoma, 433 U.S. 682 (1977).

17 *Id.* at 168.

18 *Id.* at 169.

19 Amicus brief, *supra* note 6, at 18 (citing *Brown*, 432 U.S. at 166 n.6).

20 *Id.* at 19. Aside from the *Nielsen* rule, the collateral estoppel rule of Ashe v. Swenson, 397 U.S. 436 (1970), was mentioned as another standard that offered double jeopardy protection in addition to the *Blockburger* test. In *Ashe*, the Double Jeopardy Clause barred the prosecution of the defendant for robbing several participants in a poker game because a previous acquittal of the defendant on a charge of robbing one of the other participants in the game established that defendant was not at the collective robbery. Because *Ashe* focused on a prosecution after a previous acquittal, it is not pertinent to the analysis of the *Felix* opinion.

21 *Brown*, 432 U.S. at 166 n.6. *See, e.g.*, United States v. Barrett, 933 F.2d 355 (6th Cir. 1991)(suggesting that *Grady* could bar successive conspiracy and attempt prosecutions for the same conduct, but permitting consecutive sentences for attempt and conspiracy if prosecuted in the same proceeding).

22 433 U.S. 682 (1977).

bery, which is the underlying offense of felony murder.[23] The Supreme Court reversed the armed robbery conviction on double jeopardy grounds because the facts demonstrated that the armed robbery charge was a lesser included offense of felony murder.[24] By "examining the facts of the case, rather than simply the code book, in determining whether a prior prosecution and conviction could bar a subsequent prosecution for the same conduct," the *Harris* Court employed the second part of the test constructed in *Brown*.[25]

The *Harris* rule was upheld in *Illinois v. Vitale*,[26] where the Court acknowledged that the *Blockburger* test alone was insufficient for double jeopardy protection, as it "focused on the statute without any regard to the particular facts of the case."[27] In *Vitale*, the defendant struck and killed two children with his automobile and was found guilty of failing to slow down to avoid the collision.[28] Subsequently, based on the same accident, the State attempted to prosecute Vitale for involuntary manslaughter, but the defendant objected on double jeopardy grounds.[29] The Supreme Court held that the Double Jeopardy Clause did not necessarily prohibit Illinois from prosecuting Vitale for involuntary manslaughter and remanded the case for further proceedings.[30]

In dicta, the Supreme Court said that if the underlying offense which supported the involuntary manslaughter offense was failing to slow down, then the Double Jeopardy Clause might very well have barred the subsequent prosecution since the latter prosecution

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23 *Id.*

24 Amicus brief, *supra* note 6, at 19.

25 *Id.* at 20. The Court in *Harris* cited *In re* Nielsen, 131 U.S. 176 (1889), as its principle authority for this proposition.

26 447 U.S. 410 (1980).

27 Amicus brief, *supra* note 6, at 21 (citing *Vitale*, 447 U.S. at 416).

28 *Vitale*, 447 U.S. at 411.

29 *Id.* at 413.

30 *Id.* at 421. The Court summed up its reasoning and disposition of the case by stating that:

> [I]f manslaughter by automobile does not always entail proof of a failure to reduce speed, then the two offenses are not the 'same' under the *Blockburger* test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution . . . [But] [i]f, as a matter of Illinois law, a careless failure to reduce speed offense is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*. . . . Because of our doubts about the relationship under Illinois law between the crimes of involuntary manslaughter and a careless failure to reduce speed to avoid an accident is unclear, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown, we vacate the judgment. . . .

Id. at 419, 421.

would be relying on a previously tried lesser included offense.[31] The Court noted that under *Harris*, the "appropriate inquiry" into whether the failure to slow constituted a lesser included offense of vehicular manslaughter was "on the facts to be proved by the prosecution, not simply the codal elements of the offense."[32]

The factual analysis of a defendant's conduct explicitly used by the Court in both *Brown* and in *Harris*, and implicitly suggested in *Vitale*, augmented the statutory analysis of the *Blockburger* test; the critique focused first on the statutory elements of the charged offenses and then, if necessary, scrutinized the facts of the case.[33] The Supreme Court seemingly adopted this two-part construct in its most recent pronouncement on double jeopardy, *Grady v. Corbin*.[34]

In *Grady*, the defendant drove his automobile across the double yellow line of a highway and struck two oncoming vehicles, causing the death of one person and injuring another.[35] Corbin was served with two traffic tickets; one charged him with failing to keep right of the median, and the other charged him with driving while intoxicated.[36] Corbin pleaded guilty to the two traffic tickets and was sentenced to pay fines and surrender his license for six months.[37] Two months later, a grand jury investigating the accident indicted Corbin, charging him with reckless manslaughter, second-degree vehicular manslaughter, criminally negligent homicide, and third-degree reckless assault.[38] Of the three reckless acts that the prosecutor was to use as the basis for the manslaughter and homicide charges, two were the subject of the prior conviction on the traffic tickets.[39] Corbin moved to dismiss the indictment on double jeopardy grounds. The Supreme Court granted the motion, holding that the Double Jeopardy Clause barred the homicide and manslaughter prosecutions.[40]

The Court began its analysis with a comparison of the two statutes as suggested by the *Blockburger* test, but concluded that the previous traffic court convictions did not bar the subsequent manslaughter and homicide charges on double jeopardy grounds

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31 *Id.* at 420.

32 Amicus brief, *supra* note 6, at 22.

33 *Id.* at 21-24.

34 495 U.S. 508 (1990).

35 *Id.* at 511.

36 *Id.*

37 *Id.* at 513.

38 *Id.*

39 *Id.* at 514.

40 *Id.* at 523.

since the two statutes at issue contained different elements.[41] However, the Court cited *Brown* and *Harris* for the principle that the *Blockburger* test was not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause.[42] Since *Blockburger* did not bar the subsequent prosecution, a second inquiry was undertaken to afford the defendant additional double jeopardy protection. This second inquiry focused on whether the state would prove the same *conduct* that constituted an offense for which the defendant had already been prosecuted.[43] Although the Court did not liken a "conduct" inquiry to a factual inquiry, an analysis of a defendant's conduct is by its nature "fact-intensive."[44] Thus, by apparently adding the "same conduct" test as a second prong of double jeopardy analysis, the Court in *Grady* heeded the factual analysis promoted by the *Nielsen*, *Brown*, and *Harris* line of cases and adopted the suggestion it had made in the dicta of *Vitale*.[45]

So, according to *Grady*, the test to determine whether a successive prosecution is barred by the Double Jeopardy Clause is to begin with the traditional *Blockburger* analysis.[46] If the *Blockburger* test reveals that the "offenses have identical statutory elements or that one is a lesser included offense, then the inquiry must cease, and the subsequent prosecution is barred."[47] However, *Grady* directs that if the statutes are technically different under the *Blockburger* inquiry,

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41 *Id.* at 520.

42 *Id.* The rationale of the Court was the same used in *Harris* and *Brown*, namely, "that a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from multiple trials."*Id.* at 521.

43 *Id.* at 521. The test is as follows: "[I]f the government, in order to establish an essential element of the offense, proves conduct that constitutes an offense for which the defendant has already been prosecuted, the prosecution is barred." Amicus brief, *supra* note 6, at 23.

> For example, to convict Corbin the State had to establish either recklessness or negligence beyond a reasonable doubt. If the prosecution based its theory on Corbin's negligence or recklessness stemming from driving while intoxicated, the prosecution would be barred; the prosecution could not "rely on proving" the conduct which constituted the offense for which Corbin had already been prosecuted. On the other hand, the prosecution could pursue the case if it altered its theory and relied on proof of excessive speed to establish recklessness.

Poulin, *supra* note 9, at 906.

44 Amicus brief, *supra* note 6, at 45.

45 *Id.* at 24, 45-46.

> What *Grady* imported into the double jeopardy analysis was the necessity for a highly fact-intensive inquiry by the trial judge into the proof which the government intends to use in the upcoming trial. . . . *Grady* dictates that the courts must embark in a more sophisticated factual inquiry before permitting a person to be tried repeatedly for the same conduct.

Id.

46 Grady v. Corbin, 495 U.S. 508, 516 (1990).

47 *Id.*

the reviewing court must then employ the "same conduct" test.[48]

Unfortunately, commentators criticized *Grady*'s majority opinion for its lack of clarity and development.[49] In fact, the poorly articulated holding of *Grady* created "unnecessary problems of interpretation and administration for the lower courts," especially in conspiracy cases.[50] The Court had an ideal opportunity to strengthen the loose double jeopardy framework by confronting the issue presented in *Felix*: whether a previous substantive drug conviction for attempt to manufacture and distribute bars a subsequent prosecution for other substantive drug offenses or for drug conspiracy.

III. Factual and Procedural History

During the spring of 1987, Frank Felix prepared to open an Oklahoma facility in which he would manufacture the drug methamphetamine.[51] Toward that end, he purchased precursor materials used to manufacture methamphetamine from George Dwinnells, a Drug Enforcement Administration informant.[52] Felix then supplied these items to Paul Roach in exchange for instructions on how to manufacture methamphetamine.[53] Over the next few months, Felix and Roach jointly produced methamphetamine in a trailer near Beggs, Oklahoma.[54] On July 13, 1987, government agents, acting on information provided by Dwinnells, confiscated the unattended trailer and discovered methamphetamine oil, illegal precursor chemicals, manufacturing equipment, and other evidence, some of which implicated Felix.[55] Additionally, they seized a car owned by Felix, which was parked outside the trailer.[56] The agents were not able to apprehend Felix at that time, however; he hid in the

48 "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove it." *Id.* at 521.

49 *See, e.g.*, Poulin, *supra* note 9, at 897-904.

50 *Id.* at 902-03. *See, e.g.*, United States v. Felix, 112 S. Ct. 1377, 1381 n.2 (1992)(comparing United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), and United States v. Gambino, 920 F.2d 1108 (2d Cir. 1990), which both held that the Double Jeopardy Clause barred successive conspiracy prosecutions, with United States v. Rivera-Feliciano, 930 F.2d 951 (1st Cir. 1991), and United States v. Clark, 928 F.2d 639 (4th Cir. 1991), which both concluded that the Double Jeopardy Clause does not stop the government from bringing a successive conspiracy prosecution, "even where it seeks to base the conspiracy offense on previously prosecuted conduct.").

51 *Felix*, 112 S. Ct. at 1380.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 United States v. Felix, 867 F.2d 1068, 1070 n.3 (8th Cir. 1989).

woods during the raid on the trailer.[57] Nonetheless, the DEA agents shut down the Beggs facility.[58]

On August 26, 1987, Felix, while still free, again met with DEA informant Dwinnells at a bar in Tulsa, Oklahoma, and asked to purchase more chemicals and equipment needed for the manufacture of methamphetamine.[59] Felix made a down payment of $7500 toward the purchase while at the bar.[60] He later instructed Dwinnells by phone to deliver the items to a Joplin, Missouri, hotel on August 31, 1987.[61] With DEA agents and Missouri Highway Patrol officers conducting surveillance, Dwinnells met Felix at the hotel on August 31 with the requested merchandise.[62] After Felix inspected the items and hitched his car to the trailer in which Dwinnells had transported the items, government officials arrested him for attempting to manufacture methamphetamine.[63]

Subsequently, the United States District Court for the Western District of Missouri indicted Felix on September 15, 1987, for attempting to manufacture methamphetamine between August 26, 1987, and August 31, 1987, in violation of 21 U.S.C. §§ 841(a)(1) and 846.[64] At the Missouri trial on November 30, 1987, Felix posited the defense that "he had never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation."[65] To prove otherwise, the government introduced evidence of Felix's prior acts in Oklahoma pursuant to Federal Rule of Evidence 404(b).[66] The acts introduced included Felix's prior involvement in the Beggs, Oklahoma, meth-

57 *Felix*, 112 S. Ct. at 1380.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 United States v. Felix, 867 F.2d 1068, 1070 (8th Cir. 1989). Section 841(a) states, "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ." 21 U.S.C. § 841 (1988).

Section 846 states, "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense." 21 U.S.C. § 846 (1988).

65 *Felix*, 867 F.2d at 1074.

66 *Id.* at 1072. In relevant part, Federal Rule of Evidence 404(b) says that during a criminal prosecution, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident . . ." FED. R. EVID. 404(b).

amphetamine manufacturing lab, an activity for which he had not yet been indicted.[67] In accordance with Rule 404(b), "the District Court instructed the jury that the evidence of the Oklahoma transactions was admissible only to show Felix's state of mind with respect to the chemicals and equipment he attempted to purchase from Dwinnells at the hotel in Missouri."[68] The jury convicted Felix, and the United States Court of Appeals for the Eighth Circuit affirmed.[69]

Subsequently, on February 16, 1989, the government filed an eleven-count indictment in the United States District Court for the Eastern District of Oklahoma against Felix and the other parties involved in the Beggs, Oklahoma methamphetamine lab.[70] Count 1 charged that Felix and five others conspired, between May 1, 1987, and August 31, 1987, to manufacture, possess, and distribute methamphetamine in violation of 21 U.S.C. § 846.[71] Of the nine overt acts supporting the conspiracy charge, two were based on conduct used to earlier convict Felix in Missouri.[72] Counts 2-6, 9 and 10, charged Felix with substantive infractions in violation of 21 U.S.C. § 841(a), including the manufacture of methamphetamine and the possession of methamphetamine with intent to distribute.[73] Prior to the commencement of his jury trial in Oklahoma, Felix moved to dismiss all counts of the Oklahoma indictment on double jeopardy grounds arising from the previous Missouri conviction for attempt to manufacture methamphetamine.[74] The court denied Felix's motion and determined that the conspiracy and substantive offenses enumerated in the Oklahoma indictment were distinct from the attempt offense Felix was convicted of in Missouri.[75] At trial, the government introduced much of the same evidence involving the Oklahoma transactions that the state submitted at the earlier trial in Missouri.[76] The jury convicted Felix on all counts.[77]

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67 *Felix*, 867 F.2d at 1072-73.

68 United States v. Felix, 112 S. Ct. 1377, 1380 (1992).

69 *Felix*, 867 F.2d at 1070-76.

70 *Felix*, 112 S. Ct. at 1380.

71 *Id.*

72 The two overt acts alleged in the conspiracy count charged Felix with: 1) providing "money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine" during the meeting with DEA informant Dwinnells in Tulsa, Oklahoma, on August 26, 1987; and 2) possessing "chemicals and equipment necessary in the manufacture of methamphetamine" while at the hotel in Joplin, Missouri, on August 31, 1987. *Id.*

73 *Id.* at 1380-81.

74 United States v. Felix, 926 F.2d 1522, 1525 (10th Cir. 1991).

75 *Id.*

76 *Felix*, 112 S. Ct. at 1381.

77 *Id.*

Felix appealed his Oklahoma conviction to the United States Court of Appeals for the Tenth Circuit on the grounds that the conviction was an "impermissible successive prosecution for conduct underlying his prior Missouri conviction."[78] A divided panel ruled in favor of Felix and reversed the conviction rendered by the Eastern District of Oklahoma, holding that the conviction violated the Double Jeopardy Clause of the Fifth Amendment.[79] As the basis for its reversal, the Tenth Circuit panel heavily relied on the Supreme Court's language in *Grady v. Corbin*, in which the Court asserted that the Double Jeopardy Clause bars a subsequent prosecution where the government, to establish an essential element of an offense charged in that prosecution, "will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[80]

With respect to the substantive offenses enumerated in the indictment, the Tenth Circuit panel noted that the direct evidence supporting these charges—the fact that Felix had purchased chemicals and equipment during the spring of 1987 and had subsequently manufactured methamphetamine at the Beggs, Oklahoma, trailer—had been introduced at the previous Missouri trial to show intent.[81] The Tenth Circuit concluded that this duplication "subjected Felix to a successive trial for the same conduct," and therefore reversed Felix's convictions on several of the substantive drug counts.[82] Furthermore, the Tenth Circuit concluded that the Double Jeopardy Clause also barred the Oklahoma conspiracy count because it charged "the same conduct for which [Felix] was previously convicted in Missouri."[83]

IV. Supreme Court Opinions

A. Majority Opinion

The Supreme Court granted certiorari on two primary issues: 1) whether the Double Jeopardy Clause bars Felix's prosecution on the substantive drug offenses contained in the Oklahoma indictment, and 2) whether the Double Jeopardy Clause bars Felix's prosecution for the conspiracy charge contained in the Oklahoma

78 *Felix*, 926 F.2d at 1523.

79 *Id.*

80 *Id.* at 1527 (quoting Grady v. Corbin, 495 U.S. 508, 521 (1990)).

81 *Id.* at 1530.

82 *Id.* at 1530-31. The Court of Appeals affirmed Felix's conviction on Counts 9 and 10 of the indictment which charged unlawful interstate travel. The court concluded that the conduct alleged in those counts was not sufficiently related to the conduct proved in the earlier Missouri trial to require their dismissal under the Double Jeopardy Clause.

83 *Id.* at 1530.

indictment.[84] In the majority opinion written by Chief Justice Rehnquist,[85] the Court first examined whether the Fifth Amendment's Double Jeopardy Clause, which forbids a duplicative conviction for the "same offence," should have precluded Felix's Oklahoma conviction on the substantive drug offenses.[86] The Court then contrasted the crimes charged in the Oklahoma indictment, which were related to the operation of the methamphetamine lab near Beggs, Oklahoma, with the crime charged in the Missouri indictment, which dealt solely with the attempt to purchase illegal chemicals and equipment.[87] Rehnquist concluded that "none of the offenses for which Felix was prosecuted in the Oklahoma indictment [were] in any sense the 'same offense' as the offense for which he was prosecuted in Missouri."[88] Thus, after determining that "there was absolutely no common conduct linking the alleged offenses" and "[t]hat the actual crimes charged in each case were different in both time and place," the Court held that the government was free to prosecute the Oklahoma charges.[89] In no part of its opinion, however, did the Court explicitly state it was using the two-prong test established in *Grady v. Corbin*.

Criticizing the rationale employed by the Court of Appeals in its reversal of the Oklahoma conviction, Chief Justice Rehnquist stressed that "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct."[90] Although the Tenth Circuit acknowledged that the Missouri and Oklahoma offenses did not constitute the same offense under the *Blockburger* test, the court nevertheless had concentrated on the evidence presented at the two trials and "found it decisive that the Government had introduced evidence of Felix' involvement in the Oklahoma lab to help show criminal intent for purposes of

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84 *See* United States v. Felix, 112 S. Ct. 1377, 1381 & n.2 (1992). The Court wanted to more clearly delineate the holding of *Grady v. Corbin*, primarily as it pertained to "successive prosecutions for offenses arising out of a continuing course of conduct, such as the conspiracy prosecution in this case." *Felix*, 112 S. Ct. at 1381 n.2. The fact that the Courts of Appeals had differed in applying *Grady* to such situations indicated a need for clarification. Necessarily, the Court also had to examine whether the Double Jeopardy Clause barred Felix's prosecution on the substantive drug offenses contained in the Oklahoma indictment.

85 Chief Justice Rehnquist delivered the opinion of the Court in which Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas joined, and in which Stevens and Blackmun joined in Parts I and II.

86 *Felix*, 112 S. Ct. at 1382 (quoting U.S. CONST. amend. V).

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

the Missouri trial."[91] As Chief Justice Rehnquist construed it, the Court of Appeals' holding rested on an assumption that "a mere overlap in [evidentiary] proof" established a double jeopardy violation, an assumption based on the language of *Grady v. Corbin*.[92] The Supreme Court, though, held that "this was an extravagant reading of *Grady*, which disclaimed any intention of adopting a 'same evidence' test."[93]

To further indicate that the "same conduct" test was not so broad as to bar prior acts evidence, the *Felix* Court rejected the Tenth Circuit's interpretation of *Grady* because it conflicted with the Supreme Court's earlier holding in *Dowling v. United States*.[94] In *Dowling*, the Court supported the principle that pertinent evidence of prior wrongdoing can be introduced in a subsequent case pursuant to Federal Rule of Evidence 404(b),[95] when that evidence does not "determine an ultimate issue" in the later case.[96] Applying this reasoning to the *Felix* case, Chief Justice Rehnquist held that the government was free to prosecute Felix in the Oklahoma trial for the substantive drug crimes because "at the Missouri trial, the Government did not in any way *prosecute* Felix for the Oklahoma methamphetamine transactions; it simply introduced those transactions as prior acts evidence under Rule 404(b)."[97]

The Court then addressed the second issue, examining whether the Double Jeopardy Clause should have barred the prosecution of Felix for the conspiracy charge contained in Count 1 of the Oklahoma indictment.[98] The Court summarily rejected the Tenth Circuit's judgment that the Double Jeopardy Clause barred the Oklahoma prosecution of Felix for the conspiracy charge.[99] As it had done regarding the substantive drug issue, the Court criticized the Tenth Circuit's interpretation of *Grady*, with Rehnquist stating that "taken out of context and read literally, [the *Grady*] language supports the defense of double jeopardy."[100]

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91 *Id.*

92 *Id.* at 1382. The text referred to in *Grady* stated that the Double Jeopardy Clause bars a subsequent prosecution where the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady v. Corbin, 495 U.S. 508, 521 (1990).

93 *Felix*, 112 S. Ct. at 1382.

94 493 U.S. 342 (1990).

95 *See supra* note 66 and accompanying text.

96 *Dowling*, 493 U.S. at 348. *See supra* text accompanying note 90.

97 *Felix*, 112 S. Ct. at 1383.

98 *Id.*

99 *Id.*

100 *Id.* at 1383-84.

In *Grady*,[101] the Supreme Court held that the Double Jeopardy Clause bars a subsequent prosecution where the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[102] However, the *Felix* Court "decline[d] to read the language so expansively, because of the [limited] context in which *Grady* arose and because of the difficulties which [had] already arisen in its interpretation."[103] Chief Justice Rehnquist explained that the *Grady* Court recognized that the traditional *Blockburger* test governing double jeopardy would bar a subsequent prosecution if one of the two offenses was a lesser included offense of the other.[104] However, the *Grady* Court could not simply apply that standard to the situation in *Grady* because the traffic offenses with which Grady was first charged "were not technically lesser included offenses" of the homicide charges with which he was later charged.[105]

Rehnquist further explained that in lieu of the *Blockburger* test, the *Grady* Court relied on *Illinois v. Vitale*,[106] a case in which the state sought to prosecute the defendant for involuntary manslaughter after a car accident, when it had previously charged him with a failure to slow offense.[107] As in *Grady*, "neither [Vitale] offense was technically a lesser included offense of the other," but the *Vitale* Court observed that "if the State found it necessary to rely on a previous failure to reduce speed conviction to sustain the manslaughter charge, the Double Jeopardy Clause *might* protect the defendant."[108] Without providing any rationale for doing so, Rehnquist explained that the *Grady* Court "simply adopted the suggestion . . . made in [*Vitale's*] dicta" that a traffic offense might be viewed as a "species of lesser-included offense" of the involuntary manslaughter charge.[109]

The *Felix* Court then glossed over *Grady* to address the longstanding rule for conspiracy charges, namely that "a substantive

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101 *See supra* text accompanying notes 34-40.

102 *Id.* at 521.

103 United States v. Felix, 112 S. Ct. 1377, 1384 (1992). For a catalogue of cases giving differing interpretations of *Grady*, *see supra* note 50 and accompanying text.

104 *Felix*, 112 S. Ct. at 1384.

105 *Id.*

106 447 U.S. 410 (1977). *See supra* text accompanying notes 26-32.

107 Illinois v. Vitale, 447 U.S. 410 (1977).

108 *Felix*, 112 S. Ct. at 1384 (emphasis added).

109 *Id.* at 1384 (quoting *Vitale*, 447 U.S. at 420). *See also* Poulin, *supra* note 9, at 895 (noting that "[s]ubsequent to *Vitale*, the Court passed up several opportunities to decide the double jeopardy issue presented in *Vitale*." ("*See, e.g.*, Fugate v. New Mexico, 470 U.S. 904 (1985), *aff'g per curiam*, 101 N.M. 58, 678 P.2d 686 (1984); Illinois v. Zegart, 452 U.S. 948, *denying cert. to* 83 Ill. 2d 440, 415 N.E.2d 341 (1981))." *Id.*

crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes."[110] The Court cited both *United States v. Bayer*[111] and *Pinkerton v. United States*[112] as support for the proposition that "the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself."[113] Furthermore, Rehnquist cautioned against applying double jeopardy principles originating from a single course of conduct situation such as that in *Brown v. Ohio*—which in part served as the basis for *Grady's* "same conduct" test—to a multilayered conduct situation, typical of a conspiracy prosecution.[114] Recognizing that the *Bayer-Pinkerton* reasoning is contrary to that found in *Grady*, the Court "chose to adhere to the *Bayer-Pinkerton* line of cases" that distinguish between "conspiracy to commit an offense and the offense itself."[115] The decision to embrace the *Bayer-Pinkerton* rule apparently was based on the desire to follow a more established doctrine and avoid the controversy created by *Grady*.[116]

B. CONCURRING OPINION

In concurrence, Justice Stevens[117] joined in the majority's hold-

110 *Felix*, 112 S. Ct. at 1384. The majority discussed briefly the controversy that the language of *Grady* had created among the circuit courts of appeal. *See* United States v. Calderone, 917 F.2d 717 (2d Cir. 1990)(sustaining defendant's double jeopardy claim, with each judge interpreting the *Grady* holding differently); United States v. Felix, 926 F.2d 1522 (10th Cir. 1991)(accepting defendant's double jeopardy argument based on the "same conduct" test of *Grady*). *See also supra* note 50 and accompanying text (discussing further effects of *Grady* on the circuit courts of appeal in deciding successive conspiracy cases.)

111 331 U.S. 532 (1947). In *Bayer*, the United States Armed Forces court-martialed an officer for taking illegal payments in return for favors tendered to other military personnel. The Supreme Court permitted the subsequent prosecution of Bayer in federal court for conspiring to defraud the government, "despite the fact that it was based on the same underlying incidents" that had been the subject of the prior court-martial. The Court reasoned that the "essence" of a conspiracy offense "is in the agreement or confederation to commit a crime," and therefore the conspiracy prosecution in civilian federal court was distinct from the previous court-martial conviction for accepting illicit payoffs. *Id.* at 542.

112 328 U.S. 640 (1946). "The commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses . . . [a]nd the plea of Double Jeopardy is no defense to a conviction for both offenses." *Id.* at 643.

113 *Felix*, 112 S. Ct. at 1384 (quoting *Bayer*, 331 U.S. at 542).

114 *Id.* at 1385. Multilayered conduct entails a continuing criminal enterprise, such as a drug distribution operation, which spans a lengthy time period and involves many predicate offenses. *See* United States v. Garrett, 471 U.S. 773, 775 (1985).

115 *Felix*, 112 S. Ct. at 1385.

116 *Id.*

117 Justice Stevens delivered the concurring opinion on Part III of the opinion, which Justice Blackmun joined.

ing that the Double Jeopardy Clause should not have barred the prosecution of Felix for the Oklahoma substantive drug charges.[118] Insofar as the conspiracy issue was concerned, however, the concurrence adopted the reasoning employed by Judge Anderson in his Court of Appeals' dissenting opinion.[119] In analyzing the *Grady* language that "the Double Jeopardy Clause bars a subsequent prosecution if, to *establish an essential element* of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," Judge Anderson interpreted the phrase "establish an essential element" to " 'mean constitute the entirety of the element.' "[120] In other words, when prosecuting Felix for conspiracy, the government will have violated the *Grady* "same conduct" test only if the conduct for which Felix had already been prosecuted in Missouri—the two overt acts of August 26 and August 31, 1987[121]—comprised the entirety of an element of the Oklahoma conspiracy crime.[122]

Adhering to Judge Anderson's interpretation, Justice Stevens argued that "the [two] overt acts at issue [in *Felix*] did not meaningfully 'establish' an essential element of the conspiracy."[123] The focus of the Oklahoma conspiracy indictment "concerned the conspirators' activities surrounding the Beggs lab."[124] However, the two overt acts at issue in this case encompassed Felix's illegal activity on August 26 and August 31, six weeks *after* the government confiscated the Beggs drug lab on July 13.[125] Therefore, Anderson reasoned and Stevens agreed, the two overt acts which raised double jeopardy concerns were only partly and tangentially related to Felix's conspiracy conviction and would not suffice to prove the "*entirety* of an element" of the conspiracy.[126] Consequently, since those acts did not meaningfully "establish" an essential element of

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118 *Felix*, 112 S. Ct. at 1385 (Stevens, J., concurring).

119 *Id.* at 1386 (Stevens, J., concurring).

120 United States v. Felix, 926 F.2d 1522, 1536 (10th Cir. 1991)(Anderson, J., dissenting) (quoting United States v. Calderone, 917 F.2d 717, 723-25 (2d Cir. 1990)(Newman, J., concurring)).

121 *See supra* note 72 and accompanying text (detailing the two overt acts under scrutiny).

122 *Felix*, 926 F.2d at 1536 (Anderson, J., dissenting). Justice Stevens adopts the view that the essential element of conspiracy is the agreement itself and that an overt act is not a necessary element of conspiracy under federal drug enforcement statutes. *But see Calderone*, 917 F.2d at 721 (ruling that the "conduct" at issue in a conspiracy prosecution is the conduct which constitutes the agreement, not the agreement itself).

123 *Felix*, 112 S. Ct. at 1386 (Stevens, J., concurring) (quoting *Felix*, 926 F.2d at 1536 (Anderson, J., dissenting)).

124 *Felix*, 926 F.2d at 1535 (Anderson, J., dissenting).

125 *Id.* (Anderson, J., dissenting)(emphasis added).

126 *Id.* (Anderson, J., dissenting)(emphasis added).

the conspiracy, the prosecution of Felix was permissible under the *Grady* test and the Double Jeopardy Clause.[127]

In another part of the Tenth Circuit dissent that Justice Stevens subscribed to, Judge Anderson further explained that the Court of Appeals' use of *Grady*'s language in prohibiting the Oklahoma prosecution of Felix was too broad and " 'would almost [result] in a 'same evidence' test.' "[128] Instead, Anderson contended, " 'it [was] more likely that the Supreme Court expected [the] *Grady* [language] to apply only when the conduct prosecuted at the first trial is or may constitute the entirety of an element of the offense at the second trial.' "[129]

V. ANALYSIS

This Note argues that the majority's ruling on the substantive drug charge issue was reasonable, but that the holding on the conspiracy charge was misplaced. Additionally, from a doctrinal standpoint, the majority's resolution of both issues was inadequate for its failure to clarify the confusion produced by its holding in *Grady*. The concurrence undertook, however, the type of analysis that is needed to resolve these double jeopardy issues; it implemented the "same conduct" rule of *Grady*, closely analyzing the facts necessary to assess the defendant's conduct. This note concludes that the type of analysis conducted by the concurrence furnishes defendants with the appropriate amount of constitutional protection from overreaching, modern criminal statutes.

A. THE SUBSTANTIVE DRUG OFFENSES AND HOW THE COURT SKIRTS THE "SAME CONDUCT" TEST

In *Felix*, the Supreme Court first addressed the defendant's claim that the Double Jeopardy clause should bar the substantive drug offenses contained in Counts 2 through 6 of the Oklahoma indictment.[130] Felix argued that the government had presented evidence of the Oklahoma drug operation at a prior Missouri trial to demonstrate Felix's criminal intent related to an attempt to manufacture methamphetamine charge.[131] In considering Felix's double jeopardy claim, the Court applied the traditional test for double

127 *Id.* (Anderson, J., dissenting).

128 *Id.* (Anderson, J., dissenting) (quoting United States v. Calderone, 917 F.2d 717, 724 (2d Cir. 1990)(Newman, J., concurring)).

129 *Id.* (Anderson, J., dissenting) (quoting *Calderone*, 917 F.2d at 724 (Newman, J., concurring)).

130 United States v. Felix, 112 S. Ct. 1377, 1382 (1992).

131 *Id.*

jeopardy analysis originated in *Blockburger v. United States*,[132] which basically involves a comparison of the statutory definitions of the two charges at issue. According to the "same offense" test of *Blockburger*, prosecution under each of two different statutes is permitted so long as each provision of the statute requires proof of an additional fact which the other statute does not.[133] Conversely, if each provision of the statute does require proof of the same facts as the other statute, prosecution of the defendant under one of the statutes is proscribed by the Fifth Amendment.[134]

The *Felix* Court applied the *Blockburger* test and found the Oklahoma prosecution of the substantive drug charges not to be the "same offense" that Felix had been prosecuted for in the earlier Missouri trial.[135] In examining the government's indictments, the Court noted that "Felix was charged in the Missouri case only with attempting to manufacture methamphetamine in Missouri, in late August 1987."[136] On the other hand, the five substantive drug counts of the Oklahoma indictment charged Felix with "various drug offenses that took place in Oklahoma, in June and July 1987."[137] The Court thus concluded that "none of the [substantive drug] offenses for which Felix was prosecuted in the Oklahoma indictment [were] in any sense the 'same offense' as the [attempt] offense for which he was prosecuted in Missouri."[138]

This finding was consistent with *Blockburger*, in that the provision of the Missouri statute concerning the attempt and the provision of the Oklahoma statute concerning the substantive drug offenses each required proof of an additional element which the other statute did not. Moreover, the facts indicate the ruling was equitable in that the two offenses were predicated on conduct that was essentially different as to both time and location: the Oklahoma indictment was related to Felix's conduct in the operation of the Beggs methamphetamine lab in June and July, whereas the Missouri indictment was related to Felix's attempt to buy materials in late August that would have facilitated continuation of methamphetamine operations more than two months after the Beggs lab was closed.[139]

The Court's analysis of this issue, however, is problematic. Although it examines Felix's underlying conduct, the Court fails to

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132 284 U.S. 299 (1932). *See supra* text accompanying note 10.
133 *Blockburger*, 284 U.S. at 304. *See supra* note 10 and accompanying text.
134 *Blockburger*, 284 U.S. at 304.
135 United States v. Felix, 112 S. Ct. 1377, 1382 (1992).
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*

clarify whether it is utilizing *Grady*'s "same conduct" test.[140] For instance, the Court seemed to dispose of Felix's double jeopardy claim based solely on the application of the *Blockburger* rule; it did not explicitly mention that a second prong of analysis was required pursuant to its holding in *Grady*. Interestingly, though, as part of its *Blockburger* statutory analysis, the Court justified its dismissal of Felix's claim by stating that the "actual crimes charged in each case were different in both time and place; there was absolutely no *common conduct* linking the alleged offenses."[141] By looking at whether there existed "common conduct" that would bar Felix's prosecution, the Court implicitly used and endorsed the *Grady* "same conduct" test. If the *Felix* Court indeed was invoking the *Grady* rule as a second prong of double jeopardy analysis, it should have done so unequivocally to prevent confusion about the import of its decision. Furthermore, whether it was invoking *Grady* or not, the Court must be criticized for not stating the importance of *Grady* in expanding double jeopardy doctrine.[142]

The Court failed to clear up confusion surrounding the *Grady* holding in other areas as well. After the Court determined that the two offenses for which Felix was convicted were sufficiently different for double jeopardy purposes, it explicitly noted that *Grady* did *not* stand for a "same evidence" test.[143] While this declaration served to clear up an alleged conflict between *Grady* and the previous case of *Dowling v. United States*,[144] it provided no insight into the extent of *Grady*'s precedential value in the future because the Court did not affirmatively state that *Grady* would be applicable in successive prosecutions not involving prior acts evidence.[145]

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140 *See* Grady v. Corbin, 495 U.S. 508, 521 (1990). To reiterate, the Supreme Court in *Grady* asserted that the Double Jeopardy Clause bars subsequent prosecution where the government, "to establish an essential element of an offense for which the defendant has already been prosecuted." *Id.*

141 *Felix*, 112 S. Ct. at 1382. (emphasis added).

142 *See* James M. Herrick, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in* Grady v. Corbin, 79 Ky. L.J. 847, 847 (1991) (*Grady* "defined the standard for determining what constitutes Double Jeopardy in the context of successive prosecutions by the state on different charges arising out of the same incident"). *Id. See also* Poulin, *supra* note 9, at 896 (commenting that "after *Grady*, double jeopardy analysis is not completed by merely applying the *Blockburger* test . . . *Grady* established a second prong"). *Id.*

143 *Felix*, 112 S. Ct. at 1382.

144 493 U.S. 342 (1990).

145 The conflict alluded to was recognized by Justice Scalia in his dissenting opinion in *Grady*. Justice Scalia remarked that, "I would have thought the result the Court reaches today [in *Grady*] foreclosed by our decision just a few months ago in *Dowling v. United States*." Grady v. Corbin, 495 U.S. 508, 537 (Scalia, J., dissenting). *See also id.*, 495 U.S. at 524 (O'Connor, J., dissenting)(stating that *Grady* is inconsistent with *Dowling* and not a proper interpretation of the Double Jeopardy Clause).

In *Dowling,* the defendant was charged with bank robbery.[146] To help prove his identity, the government introduced evidence under Federal Rule of Evidence 404(b) concerning the defendant's unrelated robbery of another person.[147] The introduction of this person's testimony at the bank robbery trial was upheld, even though Dowling had been acquitted of these charges in an earlier proceeding.[148] The Court held that the Double Jeopardy Clause did not bar the evidence of the robbery victim's testimony since introduction of such relevant evidence did not amount to re-prosecution of previous acts.[149]

The *Felix* Court adopted the reasoning of *Dowling*, and in doing so, it necessarily rejected the Tenth Circuit's reliance on *Grady* in barring the Oklahoma prosecution of Felix.[150] The Tenth Circuit's holding rested on an assumption that a slight duplication of evidence between two prosecutions establishes a double jeopardy violation. The Supreme Court, however, felt that that assumption was based on "an extravagant reading of *Grady*, which disclaimed any intention" of completely barring the use of previously convicted acts as evidence in a subsequent prosecution.[151]

This Note argues that the *Dowling* rule was equitably applied in the *Felix* case, for "at the Missouri trial, the Government did not in any way *prosecute* Felix for the Oklahoma methamphetamine transactions; it simply introduced those transactions as prior acts evidence under Rule 404(b)."[152] During the Oklahoma trial, the prosecution did not ask the jury to retry Felix for the attempt offense already decided in the Missouri trial; it merely used the Oklahoma evidence to establish Felix's intent in the Missouri attempt.[153] The prosecu-

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146 United States v. Dowling, 493 U.S. 342, 344 (1990).

147 *Id.* at 345.

148 *Id.* at 348.

149 *Id.* at 349, *construed in* United States v. Felix, 112 S. Ct. 1377, 1382 (1992).

150 *Felix,* 112 S. Ct. at 1383-84. Adopting the same view as taken by the Supreme Court in *Felix*, Justice Scalia noted in his dissent in *Grady* that:

> [I]n *Dowling*, as here [in *Grady*], conduct establishing a previously prosecuted offense was relied upon, not because that offense was a statutory element of the second offense, but only because the conduct would *prove the existence* of a statutory element. If that did not offend the Double Jeopardy Clause in *Dowling*, it should not do so here [in *Grady*].

Grady v. Corbin, 495 U.S. 508, 538-39 (1990)(Scalia, J., dissenting)(emphasis added).

151 *Felix*, 112 S. Ct. at 1382. The state's reliance on evidence of Felix's involvement in the Oklahoma lab to help show criminal intent at the Missouri trial persuaded the Tenth Circuit that a double jeopardy violation had occurred when that same prior acts evidence was used again at the Oklahoma trial.

152 *Id.* at 1383.

153 *See* Poulin, *supra* note 9, at 906 (distinguishing the prohibitions of *Grady* from *Dowling*).

tion's use of the Oklahoma transactions seems fair not only because it was consistent with the long-accepted Federal Rule of Evidence 404(b), but also because it precluded Felix from escaping the conviction on the ridiculous premise that he believed he was acting in a covert DEA operation at the time of the Joplin, Missouri transaction. Therefore, an extension of the "same conduct" test to bar the government from using prior acts evidence to establish elements of a criminal offense such as intent would be an overbroad reach of the test, and a result that was expressly disavowed by the Supreme Court in *Grady*.[154]

A major flaw still exists, however, in the *Felix* opinion. Even though the Court specified that "same conduct" evidence may be introduced under the *Dowling* rule without contradicting *Grady*, the final disposition of *Grady* is left unclear. Because the Court does not say whether the *Grady* holding is binding in situations where *Dowling* is inapplicable—i.e., where the evidence does not overlap—the *Felix* opinion contains a doctrinal weakness. Thus, due to the lack of clarity in *Felix*, lower federal courts will have difficulty ascertaining what precedent to follow in successive prosecution cases where there is no overlap of evidence. The Court could have made the doctrine more clear by proclaiming that while *Grady* is applicable to subsequent prosecutions based on the same conduct, it is not so broad as to encompass subsequent prosecutions based on prior acts evidence to show intent; rather, the latter situation is the domain of *Dowling*.

Moreover, the *Felix* opinion is inadequate because it did not comprehensively discuss the cases of *Brown v. Ohio*[155] and *Harris v. Oklahoma*.[156] *Brown* and *Harris* are important inasmuch as they indicated that double jeopardy analysis needed to go beyond the superficial statutory comparison characteristic of the *Blockburger* test. In those two decisions, the Court examined the facts of the cases, rather than just the statutory elements, "in determining whether a prior prosecution and conviction could bar a subsequent prosecution for the same conduct."[157] Moreover, through its factual analy-

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154 *See Grady*, 495 U.S. at 521. Justice Brennan, writing for the majority, proclaimed:

> [T]his is not an 'actual evidence' or 'same evidence' test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the Government from introducing that same evidence in a subsequent proceeding.

Id. at 521-22.

155 432 U.S. 161 (1977).

156 433 U.S. 682 (1977).

157 *See* Amicus brief, *supra* note 6, at 20 (observing that *Harris* and *Brown* ushered in a new era of double jeopardy analysis by examining the facts in addition to statutory elements). *See also Grady*, 495 U.S. at 519-20 (stating that, among other cases, *Brown* and

sis, the Court in *Brown* and *Harris* built a foundation for *Grady*'s "same conduct" test by looking at the entire set of circumstances to be proved by the prosecution in determining whether the Double Jeopardy Clause barred the prosecution.[158] *Grady* thus was the culmination of a theory of examining facts, not just statutory elements, in assessing the validity of a successive prosecution under the Double Jeopardy Clause.[159]

The importance of *Brown* and *Harris* in reshaping the analysis of successive prosecutions would seem to merit discussion of their factual examinations in other double jeopardy cases. However, inexplicably, the *Felix* Court made no mention of *Harris* or *Brown* when dealing with the substantive drug issue even though it did closely examine some of the facts of the case in assessing the propriety of a subsequent prosecution.[160] Again, the Court left out a piece of the double jeopardy puzzle, much like its deficient discussion of *Grady*, that will leave lower federal courts wondering how to weigh precedent when ruling on future successive prosecution cases.

The *Felix* Court should have fully endorsed the *Harris/Brown/Grady* use of fact-intensive inquiries in successive prosecutions not only for doctrinal reasons, but also as a matter of public policy. Today there exists a multitude of complex criminal statutes that are technically different, but which proscribe essentially the same conduct.[161] In order to adequately protect defendants from

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Harris "recognized that a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials").

158 Poulin, *supra* note 9, at 894-95.

159 *See* Amicus brief, *supra* note 6, at 23-24, 28 (concluding that *Grady* was a logical progression in a line of cases, *Brown* and *Harris* among them, which promoted factual analysis as an important tool in scrutinizing successive prosecutions).

160 *See* United States v. Felix, 112 S. Ct. 1377, 1382 (1992)(briefly comparing the differences as to time and place between the Oklahoma and Missouri drug offenses).

161 *See Grady*, 495 U.S. at 520-21.

> . . . [A] technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials. [Grady] similarly demonstrates the limitations of the *Blockburger* analysis. If *Blockburger* constituted the entire Double Jeopardy inquiry in the context of successive prosecutions, the State could try [the defendant] Corbin in four consecutive trials: for failure to keep right of the median, for driving while intoxicated, for assault, and for homicide. The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, which opening and closing arguments most persuaded the jurors. [The defendant] would be forced either to contest each of these trials or to plead guilty to avoid the harassment and expense.

Id.

See also George Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 399 (1986)(noting the need for a conduct-based test given the overlapping nature of modern criminal statutes).

such duplicative, complex statutes and ensure that defendants are not subjected to successive prosecutions for the same acts, courts need to make a fact-specific examination into a particular case.[162] By scrutinizing the facts, the "courts, as opposed to the legislatures, [will be able to define] the 'offense' " for which the defendant is being prosecuted in light of the specific circumstances surrounding the case.[163]

The "power to define an offense" should reside with the judiciary since the legislatures' efforts to generally prohibit conduct through the statutory-element scheme have resulted in "countless overlapping definitions of offenses" that create opportunities for prosecutorial misuse.[164] The "same-conduct" test of *Grady* "restore[d] the courts' power to define an 'offense' for double jeopardy purposes" by examining the facts.[165] Because of the *Felix* Court's ambiguous position on *Grady*, however, and its virtual ignorance of the antecedent cases of *Harris* and *Brown*, lower courts will not have precedential incentive to make fact-specific examinations into successive prosecution issues.[166] Without factual inquiries into conduct, the judiciaries will not exercise their power to define an "offense"; instead they will rely on the legislature's broad definition of an offense.[167] Consequently, government prosecutors will have more chance to use the technical nuances of statutes to prosecute a defendant twice for the same conduct.[168]

The factual analysis proffered in this Note can be subject to criticism because such "a case-by-case approach to defining constitutional protection . . . introduces uncertainty into double jeopardy analysis."[169] In light of this danger, the Court has "recently [utilized] 'bright line' rules to define some constitutional protec-

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162 *See* Herrick, *supra* note 142, at 857-59.

163 *Id.*

164 *Id.* at 859 ("The modern prevalence of statutory offenses poses a serious danger to the Fifth Amendment interests because what the Framers would have understood as an offense no longer exists.").

165 *Id.* (At common law, judges and juries, not the legislatures, decided exactly what constituted an offense given the facts of the case and their context; *Grady* restored that duty to the courts).

166 *See* Amicus brief, *supra* note 6, at 45 (*Grady*, *Harris*, and *Brown* "imported into double jeopardy analysis . . . the [need] for a highly fact-intensive inquiry by the trial judge into the proof . . . the government intends to use in the upcoming trial"). *Id.* Therefore, the *Felix* Court's failure to install *Grady* as the enduring double jeopardy standard or to cite *Harris* or *Brown* for support indicates a lack of concern about the deleterious impact that modern, duplicative statutes have on criminal defendants.

167 *See* Herrick, *supra* note 142, at 859.

168 *Id.*

169 Thomas, *supra* note 161, at 387.

tions."[170] However, the need for a predictable, "bright line" rule must be subordinated to the need for double jeopardy protection in the face of complex statutes which could easily be used to prosecute a defendant several times over for essentially the "same conduct."[171]

In sum, the Supreme Court's resolution of the substantive drug issue in *Felix* was unsatisfactory because the Court did not specify the importance of *Grady*'s "same conduct" test. Although the Court explicitly stated that *Grady* would not bar introduction of relevant prior acts evidence in a subsequent prosecution, just exactly what *Grady* could bar under the Double Jeopardy Clause was left uncertain. The Court also left unclear the precedential weight that courts should afford a factual inquiry into a defendant's conduct. This omission by the Court was most egregious, since the need for factual, as opposed to technical, comparisons of a defendant's conduct should seriously be considered in order to provide adequate constitutional protection against modern statutes that indict defendants more than once for the same conduct.

B. THE CONSPIRACY ISSUE

1. The Majority

The majority's holding on the conspiracy issue in *Felix* ostensibly set forth a definite, albeit conservative, ruling on the Double Jeopardy Clause. An unequivocal rule on a double jeopardy claim has benefits both for the defendant and the judiciary because it saves the time and expense involved in considering a double jeopardy argument in relation to the subsequent conspiracy charge.[172] In the context of *Felix*, such a clear rule would indicate that a subsequent prosecution for conspiracy would be valid, thus sparing the state and the defendant the cost of proceeding into a second trial to determine the constitutional propriety of the subsequent prosecution.[173]

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[170] *Id. See, e.g.*, New York v. Belton, 453 U.S. 454, 458 (1981)(search of passenger compartment of car valid per se because it is a straightforward rule that will provide constitutional certainty); South Dakota v. Opperman, 428 U.S. 364, 376 (1976)(rejecting Justice Marshall's dissent, which promoted a case-by-case analysis in Fourth Amendment automobile searches).

[171] *See* Thomas, *supra* note 161, at 388 ("When a 'bright line' rule fails to satisfy the Constitution . . . it must be eschewed").

[172] *See, e.g., id.* at 387 (discussing additional time and energy requirements associated with a case-by-case approach, thereby implying that an unequivocal rule can avoid such situations).

[173] *See id.* (noting that "the defendant in some cases must wait for the state to present its case before the judge can rule on the double jeopardy claim"). *Id.* (footnote omitted).

However, a closer examination reveals that the majority opinion in *Felix* actually created much uncertainty. The Court issued a "bright line" rule stating that conspiracy was different from an attempt to commit the substantive crime; hence, there was no double jeopardy violation when the prosecution charged Felix with conspiracy based on some of the same conduct that was the basis for the previous attempt conviction in Missouri.[174] The majority relied solely on conspiracy case precedent, reasoning that the "bright line" rule antedated and thus took precedence over the Court's earlier holding in *Grady v. Corbin*; this case stated that the Double Jeopardy Clause bars a later prosecution in which the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[175] However, the *Felix* Court neglected to explicitly state whether it was overruling *Grady* or whether it was fashioning conspiracy cases as an exception to *Grady's* "same conduct" test.[176]

Specifically, the majority in *Felix* ruled that the Oklahoma prosecution of Felix was allowable under the Double Jeopardy Clause because "a substantive crime and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes."[177] In reaching its decision, the Court relied on the conspiracy cases of *United States v. Bayer*[178] and *Pinkerton v. United States*,[179] determining that these decisions predominated over the "same conduct" test of *Grady v. Corbin*.[180] The majority's rule in *Felix* should provide certainty in dealing with conspiracy issues in the future so that it will be clear that the Double Jeopardy Clause will not bar subsequent conspiracy prosecutions based on previously prosecuted substantive crimes. Such predictability benefits both the defendant and the government, preventing both parties from going to trial to test whether the subsequent conspiracy charge will be blocked by double jeop-

174 United States v. Felix, 112 S. Ct. 1377, 1384 (1992).

175 *Id. See* Grady v. Corbin, 495 U.S. 508, 521 (1990).

176 *See supra* text accompanying notes 140-42 (suggesting similar concerns with respect to the Court's analysis of Felix's double jeopardy claim on the substantive drug charges).

177 *Felix*, 112 S. Ct. at 1384.

178 331 U.S. 532 (1947).

179 328 U.S. 640 (1946).

180 *Felix*, 112 S. Ct. at 1384. *See also* Garrett v. United States, 471 U.S. 773, 778 (1985)(stating that ". . . conspiracy is a distinct offense from the completed object of the conspiracy").

ardy concerns.[181]

However, the majority issued an extremely narrow holding on the conspiracy issue that neither resolves the doctrinal confusion over *Grady* nor adequately offers defendants constitutional protections against complex statutory provisions. Although the majority ruled that *Grady's* "same conduct" test did not act as a bar to a successive prosecution for conspiracy, it did not expressly overrule *Grady*, thereby allowing courts to use the "same conduct" in all double jeopardy issues other than those involving successive conspiracy prosecutions.[182] Ironically, the majority recognized that the federal appellate courts were interpreting the *Grady* holding inconsistently, but nevertheless "[thought] it best not to enmesh in such subtleties the established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself."[183]

For double jeopardy cases that are factually dissimilar to *Felix*, this holding provides little value to courts looking for guidance as to how *Grady* fits into the whole scheme. After *Felix*, it is unclear whether the "conduct" contemplated in the *Grady* test is applicable to all other successive prosecutions besides conspiracy, or whether the Court will strike down the "same conduct" test in a different context when it next grants certiorari on a double jeopardy issue.[184]

Furthermore, because the effect of the *Bayer-Pinkerton* rule is not much different from that of the *Blockburger* test, the *Felix* Court's adoption of it does not offer adequate protection to defendants being successively prosecuted for a conspiracy related to a substantive offense. The *Bayer-Pinkerton* analysis used by the Court simply compares the definitions of conspiracy and attempt, and it concludes

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181 *See generally* Thomas, *supra* note 161, at 387 (discussing disadvantages of case-by-case approach to constitutional concerns).

An argument could be made that the definitive rule will not benefit the parties in this way, since both parties will have to go to trial twice in any event. However, time and money can be spared by not having to consider a double jeopardy issue at all during the second trial. The parties can direct their resources at the conspiracy charge itself and not a constitutional issue. Furthermore, if previously convicted of the underlying substantive crime, there is a greater likelihood that a defendant will bargain with the government to avoid being subsequently tried for conspiracy, since his defense to this charge would be seriously weakened without the possible defense of double jeopardy.

182 *Felix*, 112 S. Ct. at 1384.

183 *Id.* at 1385. *See supra* text accompanying note 50, for an example of how federal appellate courts are divided on their interpretation of *Grady* in conspiracy cases.

184 *See* Comment, *The Supreme Court—Leading Cases*, 104 HARV. L. REV. 129, 154 (1990) (observing that in *Grady v. Corbin*, "the majority failed to present a convincing explanation of the policies underlying its decision . . . and left lower courts with little guidance as they struggle to apply *Corbin* to more complicated factual situations"). *Id.* The *Felix* majority did little to provide better guidance on either the substantive drug issue or the conspiracy issue.

that the two are not the same.[185] This type of analysis, however, does not consider that the conduct being prosecuted could constitute both a conspiracy and an attempt, and therefore is just as superficial as the statutory comparison undertaken as part of the *Blockburger* test. The *Grady* "same conduct" test "drifted far from *Blockburger*'s preoccupation with the elements of the offenses,"[186] but by displacing the "same conduct" test with the *Bayer-Pinkerton* rule (which is an analog to *Blockburger*), the *Felix* Court regressed to a time when double jeopardy analysts simply placed "two statutes on top of one another to see if the edges of each [could] be seen outside the boundaries of the other"; if any edges were seen, the subsequent prosecution was permitted by the Fifth Amendment.[187]

This Note further argues that using the *Bayer-Pinkerton* test for all subsequent conspiracy charges is no longer viable, because few modern statutes, with their complex constituent elements, will totally eclipse another. As a result, many subsequent conspiracy prosecutions will occur based on essentially the same acts that were the subject of prior substantive offenses.[188] As one commentator has explained, "the increasing number and complexity of criminal offenses intensify the need for a second-tier test based on underlying conduct."[189] The *Bayer-Pinkerton* doctrine, which the Court formulated more than fifty years ago, is insufficient for modern double jeopardy protection, and should therefore be augmented to include

185 *See Felix*, 112 S. Ct. at 1384-85.

186 Amicus brief, *supra* note 6, at 45.

187 *Id.*

188 The Court has continued to recognize the *Bayer-Pinkerton* principle over the years, *see Felix*, 112 S. Ct. at 1384 (citing Iannelli v. United States, 420 U.S. 770 (1975); Garrett v. United States, 471 U.S. 773 (1985)), but more so in the context of continuing criminal enterprise (CCE) offenses.

While this Note agrees that the scope of stringent "same conduct" analyses should not include the CCE offenses and RICO offenses prohibited by federal statutes, *see infra* text accompanying note 198, this does not translate into support for the *Felix* Court's static rule that a subsequent conspiracy charge will never violate the Double Jeopardy Clause.

The Court contends that a great majority of conspiracy prosecutions involve allegations similar to those contained in a CCE prosecution, and that "the conspiracy charge against Felix is a perfect example." *Felix*, 112 S. Ct. at 1385. Even so, Felix was not being prosecuted under the CCE statute, 21 U.S.C. § 848, and it seems unfair for the Court to incorporate by analogy *all* conspiracy prosecutions into the CCE and RICO offenses that are to be insulated from a broad "same conduct" analysis. Just because a "great majority" of conspiracy cases are similar to CCE does not mean it is justifiable to deny all criminal conspiracy defendants the double jeopardy protection offered by a "same conduct" analysis. Therefore, this Note argues that the only successive conspiracy prosecutions that should escape a factual analysis of prior conduct are those cases in which the defendant is explicitly being charged under the CCE or RICO statute.

189 Thomas, *supra* note 161, at 388.

a consideration of conduct, much like *Blockburger* has been supplemented by *Brown*, *Harris*, and now *Grady*.[190]

2. *The Concurrence*

Unlike the majority, Justice Stevens directly confronts the "same conduct" test of *Grady* and resolves some of the controversy surrounding the language of the test.[191] In the process, the concurrence subscribes to a rule that is flexible enough to provide adequate constitutional protection to defendants, but not so broad as to erect insurmountable double jeopardy hurdles to prosecutors.

Justice Stevens adopted the dissent of Judge Anderson in the Tenth Circuit's ruling of *Felix*. Anderson, in turn, relied heavily on the concurrence of Judge Newman in *United States v. Calderone*.[192] According to the Newman analysis that was later accepted by Anderson and Stevens, *Grady* should apply only "when the conduct prosecuted at the first trial is or may constitute the 'entirety' of an element of the offense at the second trial."[193] At the same time, Anderson added that "the contours of what conduct 'establishes' an essential element will have to be determined by courts applying *Grady*'s rule [and] some line-drawing will eventually be necessary."[194] Hence, the rule as suggested would give courts the discretion to make a factual inquiry into a defendant's conduct to determine whether the defendant was being unjustly prosecuted twice for the same conduct. At the same time, the rule would avoid being overly broad in that it would bar the prosecution's use of previous conduct in its case only when that conduct would constitute the *entirety* of an element of the offense charged at the second trial.

This Note argues that the concurrence's approach is superior to that of the majority in *Felix*. The majority's approach stood for an inflexible rule, unresponsive to the fact that many statutes are so alike that they subject criminal offenders to multiple indictments for

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190 *See* Comment, *supra* note 184, at 156-57:

> With its narrow focus on proof of an additional fact, the *Blockburger* test is well-suited to addressing the harassment concerns of a criminal system with few overlapping criminal offenses. However, the fact that the test allows a defendant to be tried repeatedly for the same conduct, combined with a proliferation of overlapping offenses, suggests both that it can no longer adequately protect defendants from Double Jeopardy and that the Court must interpret the Double Jeopardy Clause in light of current circumstances.

Id.

191 *Felix*, 112 S. Ct. at 1385-86 (Stevens, J., concurring).

192 917 F.2d 717 (2d Cir. 1990)(Newman, J., concurring).

193 United States v. Felix, 926 F.2d 1522, 1536 (10th Cir. 1991)(Anderson, J., dissenting)(quoting *Calderone*, 917 F.2d at 724 (Newman, J., concurring)).

194 *Id.* at 1535 n.7 (Anderson, J., dissenting).

the same criminal acts.[195] Unlike the concurrence, the majority never proposes examining the specific facts of the defendant's conduct in each case. While the majority's approach may have been acceptable many years ago, today it is inadequate. The Double Jeopardy Clause and its attendant common-law doctrine were developed at a time when fewer statutory offenses existed, most of which were readily distinguishable.[196] Hence, technical comparisons of the statutes at issue in any given double jeopardy dispute sufficed to protect defendants. However, now that there are an abundance of criminal statutes, many of which parallel several others, judges should have the latitude to constructively rule that two different offenses are essentially alike for double jeopardy purposes even if they are technically different.[197] Without a rule that evaluates conduct, courts will tend to "defer to [the legislature's] overlapping definitions of offenses" and not uphold constitutional protections intended for criminal defendants.[198]

In practice, the rule suggested by the concurrence would have

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195 *See* Thomas, *supra* note 161, at 397:

> Today . . . states have as many as sixty theft crimes with overlapping coverages that would permit an unscrupulous prosecutor to institute several prosecutions based on a single larceny. Achieving the protection intended by the drafters of the Fifth Amendment in light of modern statutory offenses requires a definition of the 'same offense' that forbids multiple trials based on the same conduct. The Supreme Court recognized this conclusion as early as 1889 in *In re* Nielsen and adopted a test prohibiting prosecution for incidents of a crime already prosecuted.

Id.

196 *Id.* Professor Thomas commented that:

> [W]hen the Double Jeopardy Clause was written and ratified, the limited number of crimes in existence made its application simple. There was no need to distinguish between offense and conduct because the two were coextensive. The only common-law theft crime was larceny, and a prosecution for taking property thus barred any subsequent prosecution based on that act.

Id.

197 *See* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970)(noting that complex statutes make criminal defendants more susceptible to unconstitutional charges made by opportunistic prosecutors).

198 Herrick, *supra* note 142, at 859. *See also* Tat Man J. So, *Double Jeopardy, Complex Crimes and* Grady v. Corbin, 60 FORDHAM L. REV. 351 (1991)(noting that "[t]he 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"). *Id.* at 351.

Paradoxically, the existence of a complex criminal statutory scheme provides incentive for a conduct-based test, but at the same time provides the impetus for an exception to that rule for selected complex statutes which otherwise could not be effectuated under a conduct-based double jeopardy analysis. Two federal statutes, the Racketeer Influence and Corrupt Organizations (RICO) statute and the Continuing Criminal Enterprise (CCE) statute, should be excepted from any "same conduct" test.

"CCE is very similar to RICO in that both require predicate acts as necessary elements of proof. Moreover, just like RICO, the legislative intent of CCE was to create a separate offense with additional punishment for engaging in a continuing 'drug enter-

worked well in *Felix*. The overt acts common to both prosecutions would have been examined but ultimately would not have acted as a double jeopardy bar since they were only tangentially related to the essence of the Oklahoma conspiracy indictment. Such acts did not "meaningfully 'establish' an essential element of the conspiracy."[199] "The indictment reveals that the crux of the Oklahoma conspiracy concerned the conspirators' activities surrounding the Beggs lab."[200] "The two overt acts encompass Felix's activity *after* the government seized the Beggs lab" on July 27, 1987, not the agreement between Felix and the co-conspirators in Oklahoma prior to July 27.[201] Although the concurrence's proposition would still have permitted Felix to be prosecuted in Oklahoma, the reasoning of Justices Stevens and Blackmun was much more attuned to the constitutional protections intended for defendants than was the reasoning of the majority. Therefore, the concurrence set forth a more desirable view, one that should be adopted in future double jeopardy analyses when considering subsequent prosecutions for conspiracy.

VI. CONCLUSION

Though the Court in *Unites States v. Felix* correctly determined that the Double Jeopardy Clause should not bar the substantive drug charges contained in the Oklahoma indictment, it failed to af-

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prise'." *Id.* at 363. Thus, considering one of the statutes dictates that the other be considered as well.

In considering a CCE statute, the court in Garrett v. United States, 471 U.S. 773 (1985), stated the CCE offense under scrutiny "[did] not lend itself to the simple analogy of a single course of conduct compris[ed of] a lesser included misdemeanor within a felony." *Id.* at 788. The court noted that the simple conduct to which they referred was the type evident in Brown v. Ohio, 432 U.S. 161 (1977). *Id.*

Since *Brown* was a component of the line of cases that led to development of the "same conduct" test in *Grady*, complex crimes such as CCE and RICO should perhaps not be subject to a "same conduct" analysis. *See also* United States v. Grayson, 795 F.2d 278 (3d Cir. 1986)(allowing complex crimes to be the subject of successive prosecutions, based on *Garrett*); United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) *cert. denied*, 111 S. Ct. 2009 (1991)(using *United States v. Grayson* as the basis for its holding that *Grady's* "same conduct" test does not apply to complex crimes). However, this Note proposes that the exception be limited to cases where the defendant is being specifically charged with an offense under the CCE or RICO statute. The exception should not be extended in general to "complex crimes," because that would include too many courses of conduct that the government could otherwise effectively prosecute without the aid of a CCE or RICO-type statute.

199 United States v. Felix, 112 S. Ct. 1377, 1386 (1992)(Stevens, J., concurring) (quoting United States v. Felix, 926 F.2d 1522, 1536 (10th Cir. 1991)(Anderson, J., dissenting)).

200 *Felix*, 926 F.2d at 1535 (Anderson, J., dissenting).

201 *Id.* (emphasis added).

firmatively state that the "same conduct" test of *Grady v. Corbin* is now a part of accepted double jeopardy analysis for successive prosecutions. Although the Court did explain that *Grady* would not present a double jeopardy obstacle to the introduction of relevant prior acts evidence under Federal Rule of Evidence 404(b), it failed to positively assert exactly what kind of conduct would be permissible under *Grady*, or even if *Grady* had to be considered in addition to the traditional "same offense" test of *Blockburger v. United States* as part of double jeopardy analysis.

As for the conspiracy issue, the majority's opinion is similarly unsatisfactory. The Court entrenched the doctrinal confusion surrounding double jeopardy analysis by shunning the "same conduct" test of *Grady* without indicating whether it was overruling the test or, alternatively, whether it was just not applying the test in the context of a successive prosecution for conspiracy. Moreover, the majority erodes defendants' constitutional rights through its "bright line" rule that a successive prosecution for conspiracy is inherently different from the attendant substantive crime, and is therefore permitted under the Double Jeopardy Clause.

The concurrence, however, seems to have met the challenge of clarifying *Grady's* rule. In doing so, Justice Stevens provided a fair assessment of Felix's "conduct" based on the facts of the conspiracy, while protecting against an overbroad reach of the *Grady* test. Furthermore, the concurrence's view indicates that it is imperative for judiciaries to consider defendants' underlying conduct in successive prosecutions, given the abundance of overlapping criminal statutes.

Unfortunately, the majority did not share in the concurrence's views. By failing to lend its unequivocal support to a fact-based inquiry into defendant's conduct, the *Felix* Court endangered the protections intended by the Fifth Amendment Double Jeopardy Clause.

ANTHONY J. DONOFRIO