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Fifth Amendment--The Adoption of the Same Elements Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy

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FIFTH AMENDMENT—THE ADOPTION OF THE "SAME ELEMENTS" TEST: THE SUPREME COURT'S FAILURE TO ADEQUATELY PROTECT DEFENDANTS FROM DOUBLE JEOPARDY

United States v. Dixon, 113 S. Ct. 2849 (1993)

I. INTRODUCTION

United States v. Dixon[1] is a consolidation of two cases from the District of Columbia Court of Appeals. The defendants in both cases violated court orders prohibiting them from engaging in criminal conduct. The United States Supreme Court considered whether the defendants could be prosecuted in separate proceedings both for contempt and for the underlying criminal conduct without violating the Double Jeopardy Clause of the Fifth Amendment.

The Court ruled that the Double Jeopardy Clause barred the prosecution of certain, but not all, of the underlying criminal offenses after a prosecution for contempt.[2] In reaching this conclusion, a bare majority overruled *Grady v. Corbin*,[3] a decision handed down just three years previously, and held that the test formulated by the Court in *Blockburger v. United States*[4] was the definitive method for deciding when a successive prosecution was constitutional.[5] In *Dixon*, the members of the Court produced five separate opinions that reveal fundamental differences among the Justices regarding the scope and purpose of the Double Jeopardy Clause. The most

1 113 S. Ct. 2849 (1993).

2 *Id.*

3 495 U.S. 508 (1990) (holding that driving while intoxicated and failing to keep to the right of the median were the same offense as vehicular homicide because all of the offenses arose out of the same conduct).

4 284 U.S. 304 (1932) (holding that the offenses of selling narcotics from a package other than the original stamped package and selling narcotics without a written order were not the "same" even though both stemmed from the same sale, because each possessed distinct elements).

5 *Dixon*, 113 S. Ct. at 2860.

vigorous disagreement occurred between Justice Scalia and Justice Souter over which of the Court's prior decisions, *Blockburger* or *Grady*, is more faithful to the Court's precedents and to the historical purpose of the Double Jeopardy Clause.

This Note argues that the debate between Justices Scalia and Souter is meaningless and that by indulging in such an exchange the Justices have failed to develop a test which adequately protects defendants from the evils of double jeopardy. The history of the Clause and the Court's early precedents are largely irrelevant to modern double jeopardy jurisprudence because the definition of offenses and the structure of the criminal justice system have changed dramatically over time. Therefore, this Note proposes that the Court simply identify the interests protected by the Clause and formulate a test to protect those values in the context of modern society. This Note suggests that the Court adopt a "same transaction" test as it would best protect the interests served by the Double Jeopardy Clause.

II. THE COURT'S HISTORICAL INTERPRETATION OF THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall be "twice put in jeopardy of life or limb" for the same offense.[6] The Court has long recognized that the clause offers defendants three distinct constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[7] While the roots of the Double Jeopardy Clause date back to antiquity, the guarantee against double jeopardy seems to be "one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights."[8]

In cases involving successive prosecutions after an acquittal or conviction,[9] there has been considerable debate over how courts

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6 U.S. CONST. amend. V. The Fifth Amendment protection against double jeopardy is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969).

7 North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (citations omitted).

8 Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

9 Because *Dixon* dealt exclusively with the issue of successive prosecutions for the same offense, this Note will not examine cases that deal primarily with the bar against multiple punishments for the same offense. For cases dealing with the multiple punishment issue, see Jones v. Thomas, 491 U.S. 376 (1989); United States v. Woodward, 469 U.S. 105 (1985); Ohio v. Johnson, 467 U.S. 493 (1984); Albernaz v. United States, 450 U.S. 333 (1981); *Whalen*, 445 U.S. at 684; Simpson v. United States, 435 U.S. 6 (1978);

should determine whether two offenses are the "same." In *Blockburger v. United States,* the Court decided that the proper test should focus on the elements of the two offense and concluded that two offenses are distinct if "each provision requires proof of a fact which the other does not."[10] Fifty years later, in *Grady v. Corbin,* the Court determined that the *Blockburger* test's focus on the elements of the offenses charged did not adequately protect defendants from exposure to double jeopardy and concluded that, in addition to examining the elements of the two offenses, courts must also look to the underlying conduct of the defendant to determine if two offenses are the "same." The Court held that if, in a second prosecution, the government must prove conduct for which the defendant has already been prosecuted to establish an essential element of an offense charged, the second prosecution is barred by the Double Jeopardy Clause.[11]

The debate over which test—the "same elements test" used by the Court in *Blockburger* or the "same conduct test" relied upon by the Court in *Grady*—best embodies the purpose of the Double Jeopardy Clause has haunted the Court for over a century. Two of the Court's earliest double jeopardy cases reveal an uncertainty as to whether the "same elements" test or the "same conduct" test is the proper vehicle for analysis. The Court first looked to the defendant's conduct in *In re Nielsen,*[12] in which the defendant was convicted for cohabitation and was later prosecuted for adultery.[13] The Court found that the subsequent prosecution for adultery was barred because when "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 offence."[14] The Court reasoned that since cohabitation and adultery both required proof of the same conduct, living together as man and wife, they constituted the same offense.[15]

Iannelli v. United States, 420 U.S. 770 (1975); Gore v. United States, 357 U.S. 386 (1958).

10 Blockburger v. United States, 284 U.S. 299, 304 (1932) (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

11 Grady v. Corbin, 495 U.S. 508, 520 (1990).

12 131 U.S. 176, 185 (1889).

13 *Id.*

14 *Id.* at 188.

15 *Id.* at 189; *see* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense,* 71 IOWA L. REV. 323, 344 (1986) (arguing that "[a] close examination of the opinion demonstrates that the *Nielsen* Court probably used [the "same conduct" test] that forbids a second trial if the prosecution must rely on conduct already used to prove another offense"); *but see* United States v. Dixon, 113 S. Ct. 2849, 2860-61 (1993) (argu-

Twenty years later, in *Gavieres v. United States*,[16] the Court abandoned the "same conduct" approach and focused solely on the elements of the crimes charged.[17] In *Gavieres*, the Court held that the Double Jeopardy Clause was not violated when a defendant was tried in two separate proceedings for offenses arising out of the same conduct.[18] The Court reasoned that each offense required proof of an element that the other did not. Therefore, the offenses were not the same, and the second prosecution did not constitute double jeopardy.[19]

In *Blockburger v. United States*, the defendant was prosecuted for selling narcotics without a written prescription and for selling narcotics from a container other than the original stamped package.[20] Citing *Gavieres*, the *Blockburger* Court held that although both violations resulted from a single narcotics sale, the offenses were distinct because "each provision require[d] proof of a fact which the other [did] not."[21] In the years after *Blockburger*, the Court focused exclusively on the elements of offenses to determine if they were the "same" according to the Double Jeopardy Clause, and only in 1977 did a question develop as to whether the *Blockburger* test properly protected defendants from double jeopardy.

The first challenge to the *Blockburger* "same elements" test arose in *Brown v. Ohio*,[22] which presented the Court with the question of whether a prosecution for a lesser included offense barred a prosecution for the greater offense.[23] In *Brown*, a defendant who had been prosecuted for joyriding was subsequently prosecuted for auto theft stemming from the same incident.[24] The Ohio Court of Appeals held that joyriding was the lesser included offense of auto

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ing that the *Nielsen* Court barred the prosecution for adultery because adultery had the same essential elements as cohabitation).

16 220 U.S. 338 (1911).

17 *Id.* at 343-44.

18 *Id.*

19 *Id.*

20 Blockburger v. United States, 284 U.S. 299, 303-04 (1932).

21 *Id.* at 304. In 1970, the Court refined the *Blockburger* test by ruling that the doctrine of collateral estoppel, which provides that an issue of ultimate fact cannot be relitigated once it has been decided, was embodied in the Double Jeopardy Clause. Therefore, even if two offenses are distinct under the *Blockburger* test, a defendant cannot be retried if the second trial would require relitigating a fact that was resolved in the defendant's favor in a previous trial. *See* Ashe v. Swenson, 397 U.S. 436, 443-45 (1970).

22 432 U.S. 161 (1977).

23 *Id.* A lesser included offense is an offense "which is composed of some, but not all elements of a greater offense and which does not have any element not included in [the] greater offense so that it is impossible to commit [the] greater offense without necessarily committing the lesser offense." BLACK'S LAW DICTIONARY 902 (6th ed. 1990).

24 *Brown*, 432 U.S. at 163.

theft because " '[e]very element of [joyriding] is also an element of the crime of auto theft. The difference between the crime of stealing a motor vehicle, and [joyriding was] that conviction for stealing requires proof of an intent on the part of the thief to *permanently* deprive the owner of possession.' "[25] Citing *Blockburger*, the *Brown* Court held that a defendant who has been prosecuted for a lesser included offense cannot be retried for the greater offense, because a lesser included offense "requires no proof beyond that which is required for a conviction of the greater"; therefore, the two offenses are the same.[26] While *Blockburger* involved an issue of whether multiple punishments for the same offense were constitutional, the *Brown* Court ruled that "[i]f two offenses are the same under [the *Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions."[27] Moreover, the Court noted this test embodied the "Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen* was decided in 1889."[28]

Despite *Brown*'s apparent endorsement of a broad application of the *Blockburger* test, the Court's opinion created confusion over what was the appropriate test to apply. The Court stated in a footnote that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense."[29] By coming to apparently inconsistent conclusions—that *Blockburger* is the proper test in successive prosecution cases and that *Blockburger* is not the only test for determining when a successive prosecution is barred—the Court allowed for differing opinions as to how to determine the definition of "same."[30]

Illinois v. Vitale[31] further added to the confusion. In *Vitale*, the defendant first pleaded guilty to failure to reduce speed to avoid an

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25 *Id.* at 163-64.

26 *Id.* at 168. *See also* Harris v. Oklahoma, 433 U.S. 682 (1977). In that case, the Court concluded that when a defendant has been prosecuted for the greater offense he cannot be subsequently tried for the lesser offense, because proof of the greater offense necessarily required the prosecutor to prove all the elements of the lesser offense. Therefore, the Court held that a charge for robbery with a firearm was precluded by the Double Jeopardy Clause, because the defendant had previously been prosecuted for felony murder with armed robbery as the underlying felony. *Id.* at 682.

27 *Brown*, 432 U.S. at 166 (citing *In re* Nielsen, 131 U.S. 176 (1889)).

28 *Id.* at 168.

29 *Id.* at 166 n.6 (citing *In re* Nielsen, 131 U.S. 176 (1889)).

30 *See* Thomas, *supra* note 15, at 348 (arguing that although the *Brown* Court's holding is dependent on the *Blockburger* test, the Court in fact endorsed the "same conduct" test in dicta by stating that the *Blockburger* test was only one method for deciding double jeopardy claims). *But see* United States v. Dixon, 113 S. Ct. 2849, 2861 (1993) (arguing that the *Brown* decision endorsed the "same elements" test).

31 447 U.S. 410 (1980).

accident and then was charged with involuntary manslaughter stemming from the same accident.[32] The Supreme Court ruled that the subsequent prosecution for involuntary manslaughter would be barred if the prosecution had to establish failure to reduce speed to prove involuntary manslaughter.[33] If, however, failure to slow was not required, "the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure [to obtain a conviction for manslaughter]. . . . In that case, because [the defendant] has already been convicted for [that] conduct . . . , his claim of double jeopardy would be substantial . . . ."[34] By suggesting this possibility, the Court seemed to imply that the proper analysis in double jeopardy claims should focus on the underlying conduct, rather than the elements of the offense charged.

The Court's decision in *Grady v. Corbin* appeared to resolve the issue presented in the hypothetical situation in *Vitale* by concluding that when a subsequent prosecution requires proof of conduct for which the defendant has already been prosecuted, it is barred by the Double Jeopardy Clause.[35] In *Grady*, the defendant was involved in an auto accident and pleaded guilty to driving while intoxicated and failing to keep to the right of the median.[36] Two months after his guilty plea, the grand jury charged him with reckless vehicular manslaughter, negligent manslaughter and other related charges stemming from the same car accident.[37] In its analysis, the Court reexamined its decisions on the constitutionality of successive prosecutions[38] and concluded that the Court had departed from the *Blockburger* decision repeatedly because the "same elements" test did not adequately protect defendants from double jeopardy.[39]

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32 *Id.* at 411-13.

33 *Id.* at 419. The Court did not make a definitive ruling on the constitutionality of the manslaughter charge because the Illinois Supreme Court had not clearly delineated the necessary elements of manslaughter. Consequently, the Court remanded the case for a definitive ruling as to the necessary elements of manslaughter and a disposition of the case consistent with the Court's ruling. *Id.* at 421.

34 *Id.* at 420.

35 Grady v. Corbin, 495 U.S. 508, 521 (1990).

36 *Id.* at 511-12.

37 *Id.* at 513-14.

38 Most notably, the Court re-evaluated its decision in Harris v. Oklahoma, 433 U.S. 682 (1977), concluding that under a strict application of *Blockburger* the two offenses were not the same because felony murder could be established with any felony, not just robbery with a firearm, and robbery with a firearm did not require proof of death. Therefore, the Court decided that the *Harris* Court did not exclusively rely on the *Blockburger* test in concluding that a prosecution for a lesser offense is barred when the defendant has been previously prosecuted for the greater offense. *Grady*, 495 U.S. at 519-20.

39 *Grady*, 495 U.S. at 519-20.

Thus, rather that strictly adhering to a ineffective precedent, the Court adopted a two-part test, which it felt better served the interests of the Clause.[40] The Court held that in determining whether a successive prosecution is barred by the Double Jeopardy Clause, "a court must first apply the traditional *Blockburger* test."[41] If the prosecution fails this test, it is barred. If, however, the prosecution survives the *Blockburger* test, it is nonetheless barred if "to establish an essential element of an offense charged in the second prosecution, [the government] will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[42] Applying this test to the facts of *Grady*, the Court concluded that the subsequent prosecutions for homicide and assault were barred because the State conceded that "it [would] prove the entirety of the conduct for which [the defendant] was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses."[43]

Justice Scalia vigorously dissented from the majority's *Grady* opinion on two grounds.[44] First, he asserted that the majority's conclusion that the defendant's conduct was dispositive in double jeopardy claims was contrary to double jeopardy jurisprudence dating back to English eighteenth century common law.[45] Justice Scalia specifically attacked the majority's reliance on *Vitale* as support for the "same conduct" test, arguing that *Vitale*'s statement that the defendant would have a "substantial" double jeopardy claim if the prosecution relied on the defendant's conduct in failing to slow to prove manslaughter was pure *dicta* and had no foundation in any of the Court's earlier precedents.[46] Consequently, it provided an inadequate foundation for overturning the long-standing *Blockburger*

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40 The Court noted that the Clause was designed to prevent the state, with its superior resources, from making multiple attempts to convict an individual, thus "subjecting [the defendant] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Id.* at 518 (quoting Green v. United States, 355 U.S. 184, 187 (1957) (internal quotes omitted)). Further, the Court pointed out that if the state were allowed to bring repeated prosecutions, the chances of an erroneous guilty verdict would increase. *Id.* (citing Tibbs v. Florida, 457 U.S. 31, 41 (1982)).

41 *Id.* at 516.

42 *Id.* at 521.

43 *Id* at 523.

44 *Id.* at 526 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Kennedy joined Scalia's dissent.

45 *Grady*, 495 U.S. at 530-35 (Scalia, J., dissenting). Justice Scalia contended that the *Blockburger* test was proper because it reflected a "venerable understanding" of the purpose and meaning of the Double Jeopardy Clause, and because the Supreme Court, with two exceptions, has consistently adhered to the *Blockburger* test. *Id.* at 535 (Scalia, J., dissenting).

46 *Id.* (Scalia, J., dissenting).

test.[47]

Second, Justice Scalia argued that, from a purely linguistic standpoint, the *Blockburger* test "best gives effect to the language" of the Double Jeopardy Clause.[48] In his view, the language of the Clause specifically protects a defendant from being prosecuted twice for the same offense, not from being prosecuted twice for the same conduct.[49] Additionally, Justice Scalia maintained that the Clause presupposes that a double jeopardy determination can be made before trial; "[o]therwise, the Clause would have prohibited a second 'conviction' or 'sentence' for the same offense."[50] The *Grady* test cannot definitively resolve double jeopardy claims before trial because a final disposition is dependent on the evidence the prosecution presents at trial. Therefore, Justice Scalia argued that *Grady* does not comport with the language of the Clause.[51] In Justice Scalia's view, the *Blockburger* test better embodies the language of the Double Jeopardy Clause, because by focusing on the elements of the offense, it can definitively resolve double jeopardy claims before an unconstitutional trial.[52] It was left for the Court in *Dixon* to decide if Scalia's arguments in his *Grady* dissent were persuasive.

III. FACTUAL BACKGROUND

A. RESPONDENT ALVIN J. DIXON

On March 9, 1987, Alvin J. Dixon was arrested for second degree murder.[53] Pursuant to the District of Columbia's bail law,[54] Dixon was released on bond on the condition that he not commit "any criminal offense."[55] Dixon's release form specifically stated that he would be prosecuted for contempt of court if he violated any conditions of his release.[56] In January 1988, while awaiting trial, Dixon was arrested and indicted for possession of cocaine with in-

47 *Id.* at 536-38 (Scalia, J., dissenting).

48 *Id.* at 529 (Scalia, J., dissenting).

49 *Id.* (Scalia, J., dissenting).

50 *Id.* (Scalia, J., dissenting).

51 *Id.* at 529-30 (Scalia, J., dissenting).

52 *Id.* (Scalia, J., dissenting).

53 Brief for Petitioner at 5, United States v. Dixon, 113 S. Ct. 2849 (1993) (No. 91-1231).

54 District of Columbia law provides that a judicial officer may impose any condition on an individual that "will reasonably assure the appearance of the person for trial or the safety of any other person or the community." D.C. CODE ANN. § 23-1321(a) (1989).

55 United States v. Dixon, 113 S. Ct. 2849, 2853 (1993).

56 *Id.* District of Columbia law provides that if any conditions are imposed on the release, the judicial officer shall "issue an appropriate order containing a statement of the conditions imposed, if any, [and] shall inform such person of the penalties applicable to violations of the conditions of his release." D.C. CODE ANN. § 23-1321(d) (1989).

tent to distribute.[57] The superior court judge required Dixon to demonstrate why he should not be found in contempt of court, or why the terms of his release should not be modified.[58] After a hearing in which the prosecution and defense both presented evidence, the court determined that the government had established beyond a reasonable doubt that Dixon was guilty of possession of cocaine with the intent to distribute.[59] Consequently, the court found Dixon guilty of criminal contempt and sentenced him to 180 days in jail.[60]

Thereafter, Dixon moved to dismiss the indictment for possession of cocaine on grounds that it violated his rights under the Double Jeopardy Clause.[61] The prosecution argued that contempt of court and possession of cocaine with the intent to distribute were two different offenses; and therefore the prosecution of both in separate trials did not constitute double jeopardy.[62] The court rejected the government's argument and dismissed Dixon's indictment.[63] The prosecution appealed.[64]

B. RESPONDENT MICHAEL FOSTER

Alleging that Michael Foster had repeatedly assaulted her, Foster's wife, Ana Foster, obtained a civil protection order on August 12, 1987, in the Superior Court of the District of Columbia.[65] The order stated that Foster could not "molest, assault, or in any manner threaten or physically abuse" her.[66] In August 1988, Foster was brought before a judge for sixteen alleged violations of that order.[67] The relevant contempt charges for violating the protective order accused Foster of threatening his wife on November 12, 1987, March 26, 1988, and May 17, 1988, and of assaulting her on November 6, 1987, and May 21, 1988.[68]

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57 Brief of Petitioner at 6, *Dixon* (No. 91-1231); *see* D.C. CODE ANN. § 33-541(a)(1) (1993).

58 *Dixon*, 113 S. Ct. at 2853.

59 United States v. Dixon, 598 A.2d 724, 728 (D.C. 1991), *aff'd in part and rev'd in part and remanded*, 113 S. Ct. 2849 (1993).

60 *Dixon*, 113 S. Ct. at 2853. The District of Columbia allows contempt sanctions to be imposed after an expedited proceeding without a jury and "in accordance with principles applicable to proceedings for criminal contempt." D.C. CODE ANN. § 23-1329(c) (1989).

61 *Dixon*, 113 S. Ct. at 2853.

62 Brief for Petitioner at 7, *Dixon* (No. 91-1231).

63 *Id.*

64 *Id.*

65 *Id.* at 2.

66 *Id.* at 3.

67 *Id.*

68 United States v. Dixon, 113 S. Ct. 2849, 2854 (1993).

Ana Foster's attorney privately prosecuted the contempt charges, and while the United States was not a party to the action, the United State's Attorney was aware of the trial.[69] To obtain a conviction for contempt, the court required Foster's wife to prove the existence of the civil protection order and all the elements of the underlying criminal offense.[70] After a bench trial, the court found Foster guilty of violating the terms of the protective order for the assaults occurring on November 6, 1987, and May 21, 1988; however, Foster was acquitted of all charges relating to the alleged threats against his wife.[71] Foster was sentenced to 600 days imprisonment.[72]

After the contempt trial, the United States Attorney's Office obtained a five count grand jury indictment against Foster that charged him with one count of simple assault, three counts of threatening his wife, and one count of assault with intent to kill.[73] All of the charges handed down by the grand jury were based on the exact actions for which Foster had already been prosecuted for contempt of court.[74] Foster filed a motion to dismiss the indictment, claiming that all charges were barred by the Double Jeopardy Clause. The trial court denied his double jeopardy claim, and Foster appealed the ruling.[75]

C. THE CONSOLIDATED APPEAL

Initially Dixon and Foster's appeals were argued separately; however, before rendering a decision, the District of Columbia Court of Appeals consolidated the two cases and reheard them en banc.[76] Concluding that the Supreme Court's decision in *Grady* was controlling, the Court of Appeals ruled that all the criminal charges against the two defendants were barred by the Double Jeopardy Clause because the conduct underlying both contempt prosecutions was "the very same conduct for which the government now seeks to try them."[77] Thus, *Grady* compelled a conclusion that "those cases cannot be tried, now or ever."[78] Moreover, the Court found that its decision was supported by two state supreme court cases[79] which

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69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 Id.
75 *Id.*
76 Brief for Petitioner at 7, *Dixon*, (No. 91-1231).
77 United States v. Dixon, 598 A.2d 724, 731 (D.C. 1991).
78 *Id.*
79 *See* State v. Kipi, 811 P.2d 815, 820 (Haw. 1991) (holding that a defendant who

had been handed down after *Grady*.[80] In those cases, the courts ruled that when a criminal prosecution seeks to prove conduct for which a defendant has already been tried in a contempt proceeding, the prosecution is barred by the Double Jeopardy Clause.[81]

The United States Supreme Court granted certiorari[82] to determine whether "the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court."[83]

IV. THE SUPREME COURT OPINIONS

A. JUSTICE SCALIA'S OPINION

Writing for the majority,[84] Justice Scalia concluded that since criminal contempt is considered a crime, defendants in nonsummary contempt proceedings,[85] the type of proceedings Dixon and Foster faced, must receive all the constitutional safeguards that defendants in criminal trials receive.[86] Therefore, Dixon and Foster were protected by the Double Jeopardy Clause during their contempt proceedings.[87] The majority then explained that, according to *Grady*, a prosecution for criminal conduct that had been the basis of a nonsummary contempt proceeding is constitutional only if the criminal charge is distinct from the contempt charge according to

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pleaded no contest to a criminal contempt charge for violating a protective order could not be subsequently prosecuted for burglary and terroristic threats "based on the same conduct that lead to his contempt conviction"), *cert. denied*, 112 S. Ct. 194 (1991); State v. Magazine, 393 S.E.2d 385 (S.C. 1990) (holding that according to *Grady* a defendant who had been held in contempt of court for violating a protective order could not subsequently be tried for criminal assault if the assault charge was based on the same conduct that supported the contempt charge).

80 *Dixon*, 598 A.2d at 731.

81 *Kipi*, 811 P.2d at 820; *Magazine*, 393 S.E.2d at 387.

82 United States v. Dixon, 112 S. Ct. 1759 (1992).

83 United States v. Dixon, 113 S. Ct. 2849, 2854 (1993).

84 Chief Justice Rehnquist and Justices O' Connor, Kennedy and Thomas joined Justice Scalia in Part II of his opinion.

85 A nonsummary contempt proceeding is initiated by the court when an individual violates specific court orders. In contrast, a summary contempt proceeding is initiated by the court when an individual's acts in the courtroom interfere with the administration of justice. *Dixon*, 113 S. Ct. at 2855-56.

86 *Id.* at 2855-56 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (providing for the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the guarantee against self-incrimination in nonsummary criminal contempt proceedings); Cooke v. United States, 267 U.S. 517 (1925) (providing for the notice of charges, the assistance of counsel and the right to present a defense to nonsummary criminal contempt proceedings); *In re* Oliver, 333 U.S. 257 (1948) (providing for the right to a public trial in criminal contempt proceedings)).

87 *Id.*

both the *Blockburger* "same elements" test and the *Grady* "same conduct" test.[88]

In Part III of his opinion, Justice Scalia applied the *Blockburger* test to the criminal charges against Dixon and Foster.[89] Although only Justice Kennedy joined Justice Scalia's reasoning in Part III, the concurring Justices formed a majority with respect to the application of the *Blockburger* test to the charges against Dixon and Foster.

In Part III(A),[90] Justice Scalia concluded that the *Blockburger* test prohibited both the prosecution of Dixon for possession of cocaine with intent to distribute and the prosecution of Foster for simple assault.[91] Specifically, Justice Scalia reasoned that since Dixon's release order prohibited him from violating any criminal law, the District of Columbia Criminal Code was effectively incorporated into the court order.[92] Analogizing Dixon's case to *Harris v. Oklahoma,*[93] Justice Scalia concluded that the incorporation of the District of Columbia Criminal Code in the court order made the substantive drug offense a lesser included offense of criminal contempt.[94] Therefore, since Dixon had already been prosecuted for the greater offense—contempt of court—the subsequent prosecution for the lesser included offense of possession of cocaine with intent to distribute was barred by the Double Jeopardy Clause.[95] Justice Scalia applied the same analysis to the simple assault count against Foster and concluded that since the civil protection order forbade Foster from assaulting his wife, the simple assault charge was a lesser included offense of contempt.[96] Thus, it was likewise barred by the Double Jeopardy Clause.[97]

However, in Part III(B) of his opinion,[98] Justice Scalia concluded that according to the *Blockburger* test Foster could be tried on the count of assault with intent to kill and the counts of threatening his wife, because the criminal prosecution and the contempt prose-

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88 *Id.* at 2856.

89 *Id.* at 2856-59.

90 Justices Kennedy, White, Stevens, and Souter concurred with Scalia's disposition of the facts in Part III(A).

91 *Dixon,* 113 S. Ct. at 2858.

92 *Id.* at 2857.

93 433 U.S. 682 (1977); *see also supra* notes 26 and 38.

94 *Dixon,* 113 S. Ct. at 2857. The elements of contempt are knowledge of a court order by the defendant, and a willful violation of one of the conditions of the order. *In re* Thompson, 454 A.2d 1324, 1326 (D.C. 1982).

95 *Dixon,* 113 S. Ct. at 2857.

96 *Id.*

97 *Id.*

98 Chief Justice Rehnquist and Justices O' Connor, Thomas, Blackmun and Kennedy concurred with Justice Scalia's disposition of the facts in Part III(B).

cutions each required proof of an element that the other did not.[99] Specifically, the contempt charge required proof of knowledge of the protective order, whereas the assault with intent to kill did not; and the assault with intent to kill required proof of specific intent, which was not required under the contempt charge.[100] Similarly, Justice Scalia concluded that the three criminal threat charges against Foster were not barred by the *Blockburger* test, despite the fact that Foster had been acquitted of this conduct at his contempt trial, because the contempt charge and the criminal threat charge each contained a distinct element.[101] A conviction for contempt required proof that Foster willfully violated the civil protection order, but a conviction for criminally threatening his wife did not.[102] Likewise, a conviction for criminal threatening specifically required that the threat be one to kidnap, to inflict bodily injury, or to damage property; however, a conviction for contempt only required proof that Foster threatened his wife in "any manner."[103]

After concluding that the charges against Foster for assault with intent to kill and threatening his wife were not barred by the *Blockburger* test, the Court then had to determine, according to the *Grady* decision, whether the government would have to prove the same conduct for which Foster had already been tried.[104] Justice Scalia[105] concluded that the prosecution would because the assault on May 21, 1988, and the threats that allegedly occurred on November 12, 1987, March 26, 1988, and May 17, 1988, were the basis of the contempt proceeding and would likewise be the foundation for the criminal proceedings.[106] Therefore, the prosecution for these offenses would be barred by the *Grady* test.[107] Rather than accepting this result, the majority decided to overrule *Grady* and re-adopt the *Blockburger* rule as the exclusive test for determining the constitutionality of subsequent prosecutions.[108]

The majority decided to overrule *Grady* because they believed the decision "lack[ed] constitutional roots" and was an aberration in

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99 *Dixon*, 113 S. Ct. at 2858.
100 *Id.* at 2858-59.
101 *Id.* at 2859.
102 *Id.*
103 *Id.*
104 *Id.* The charge against Dixon and the simple assault charge against Foster were not subjected to the *Grady* test because they were conclusively barred by the *Blockburger* test. *See supra* notes 89-97 and accompanying text.
105 Chief Justice Rehnquist and Justices Kennedy, O' Connor, and Thomas joined Justice Scalia to form a majority.
106 *Dixon*, 113 S. Ct. at 2860.
107 *Id.*
108 *Id.*

the Court's double jeopardy jurisprudence.[109] However, rather than setting forth detailed arguments to support this decision, Justice Scalia simply cited his own dissent in *Grady*[110] and countered Justice Souter's dissenting argument[111] that the Court has historically rejected the *Blockburger* rule as the exclusive test in double jeopardy claims.[112] Justice Scalia specifically attacked Justice Souter's interpretation of four cases Souter offered as support for *Grady*, asserting that Souter had either misconstrued the Court's holdings in those cases or relied on mere dicta to support his position.[113]

Justice Scalia first disputed Justice Souter's claim that *In re Nielsen* supported the *Grady* "same conduct" test.[114] Justice Souter argued the *Nielsen* Court had rejected a version of the "same elements" test and focused instead on the conduct of the defendant.[115] However, Justice Scalia's opinion observed that the *Nielsen* Court had simply applied a "common proposition, entirely in accord with [the 'same elements' test], that a prosecution for a greater offense (cohabitation, defined to require proof of adultery) bars prosecution for a lesser included offense (adultery)."[116] Further, Justice Scalia cited two Supreme Court precedents as support for his position that *Nielsen* rejected the "same conduct" test.[117] In both cases the Court purported to follow the *Nielsen* decision, yet it permitted subsequent prosecutions after applying only the "same elements" test.[118] Justice Scalia argued that the cases were

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109 *Id.* at 2860-64.

110 Grady v. Corbin, 495 U.S. 508, 526-44 (1990) (Scalia, J., dissenting); *see also supra* notes 44-52 and accompanying text.

111 *Dixon*, 113 S. Ct. at 2881-91 (Souter, J., concurring in part and dissenting in part); *see also infra* notes 196-213 and accompanying text.

112 *Dixon*, 113 S. Ct. at 2860.

113 *Id.* at 2860-62.

114 *Id.* at 2860.

115 *Id.* at 2885-86 (Souter, J., concurring in part and dissenting in part). *See also infra* notes 196-98 and accompanying text.

116 *Dixon*, 113 S. Ct. at 2860-61.

117 *Id.* at 2863 (citing Gavieres v. United States, 220 U.S. 338 (1911) and Burton v. United States, 202 U.S. 344 (1906)). Justice Souter interpreted these two cases more narrowly. He conceded that in *Gavieres* the Court had applied only the *Blockburger* test in determining whether a subsequent prosecution was permissible. However, Souter contended that the *Gavieres* decision rested on an interpretation of a Philippine statute, which the Court has never treated as an authoritative interpretation of the Fifth Amendment. *Id.* at 2889 (Souter, J., concurring in part and dissenting in part). Moreover, Justice Souter noted that *Burton* came before the Court on a demurrer, so the Court was not presented with the factual basis for the charge. *Id.* (Souter, J., concurring in part and dissenting in part). Thus, Justice Souter believed *Burton* stands for the narrow proposition that "a claim of double jeopardy resting exclusively on pleadings cannot be adjudicated on any basis except the elements pleaded." *Id.* (Souter, J., concurring in part and dissenting in part).

118 *Id.* at 2862.

"incompatible with the belief" that *Nielsen* could be interpreted as supporting the *Grady* "same conduct" test.[119]

Justice Scalia next disagreed with Justice Souter's interpretation of *Brown v. Ohio.*[120] Justice Souter argued that *Brown* also supported the *Grady* test, because the Court stated that the *Blockburger* test was not the exclusive method for determining whether a successive prosecution is barred by the Double Jeopardy Clause.[121] Justice Scalia responded by pointing out that this statement was made in a footnote. Consequently, it was pure dicta and could not serve as precedent.[122] Justice Scalia further asserted that in *Harris v. Oklahoma,* the Court had focused solely on the elements of the offense, not the conduct of the defendants, as Justice Souter claimed.[123]

Lastly, Justice Scalia took issue with Justice Souter's position that *Illinois v. Vitale* offered support for the *Grady* test.[124] Justice Souter argued that the *Vitale* Court rejected the *Blockburger* test as the exclusive mechanism for settling double jeopardy claims when it stated that the defendant would have a "substantial" double jeopardy claim if conduct for which he already had been prosecuted was used as evidence in a subsequent trial.[125] However, Justice Scalia concluded that this statement was dicta that simply raised a question rather than asserted a proposition.[126] Consequently, it could not be used as support for the proposition that the Court has traditionally looked to the underlying conduct in double jeopardy cases.[127]

The majority further asserted that *Grady* must be overturned because it had proven unworkable in application.[128] Justice Scalia cited the Court's decision in *United States v. Felix,*[129] a case that carved a large exception out of the *Grady* test soon after it was decided, as support for this contention.[130] In *Felix,* the Court allowed a prosecution for conspiracy, despite the fact that at trial the government proved conduct for which the defendant had been previously

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119 *Id.*

120 *Id.* at 2861.

121 *Id.* at 2887 (Souter, J., concurring in part and dissenting in part); *see also infra* notes 200-01 and accompanying text.

122 *Dixon,* 113 S. Ct. at 2861.

123 *Id.*

124 *Id.* (citing Illinois v. Vitale, 447 U.S. 410 (1980)).

125 *Id.* at 2887-88 (Souter, J., concurring in part and dissenting in part); *see also infra* notes 207-10 and accompanying text.

126 *Dixon,* 113 S. Ct. at 2862.

127 *Id.*

128 *Id.* at 2863.

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

130 *Dixon,* 113 S. Ct. at 2863.

convicted, because there was "long-standing authority" that a prosecution for the substantive offense did not preclude a subsequent conviction for conspiracy.[131] For the majority, the need to carve such a large exception out of *Grady*, so soon after it was decided, created unnecessary confusion and raised the question of whether that case was properly decided.[132]

In sum, the majority viewed the *Grady* "same conduct" test as a break with long-standing precedent that had proven unworkable in application. The majority concluded that *Grady* "was a mistake" and that upholding it would "mock" the principle of stare decisis.[133] Therefore, the Court unequivocally overturned *Grady* and concluded that the *Blockburger* "same elements" test was the sole test for determining when a subsequent prosecution is barred by the Double Jeopardy Clause.[134]

B. CHIEF JUSTICE REHNQUIST'S OPINION

Writing for two other members of the Court,[135] Chief Justice Rehnquist dissented from Part III(A) of Justice Scalia's opinion, which held that the criminal drug charge against Dixon and the simple assault charge against Foster were barred by the Double Jeopardy Clause.[136] In the Chief Justice's view, none of the criminal charges brought against Dixon or Foster was barred by the *Blockburger* test.[137] Rehnquist insisted that the *Blockburger* test only required the Court to examine the generic elements of contempt,[138] and the elements of the substantive offense, not the specific prohibitions of the court order, to determine whether the criminal prosecution was permissible.[139] Under this method of analysis, none of the criminal prosecutions was barred because the elements of contempt are distinct from the elements of the substantive offenses.[140] The Chief Justice criticized Justice Scalia's conclusion, which relied on *Harris*, that the court order incorporated the elements of possession with intent to distribute and assault into the elements of con-

131 *Id.* (citing *Felix*, 112 S. Ct. at 1384-85).
132 *Id.*
133 *Id.* at 2864.
134 *Id.*
135 Justice O' Connor and Justice Thomas joined the Chief Justice's opinion.
136 *Dixon*, 113 S. Ct. at 2865 (Rehnquist, C.J., concurring in part and dissenting in part).
137 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).
138 *See supra* note 94.
139 *Dixon*, 113 S. Ct. at 2867 (Rehnquist, C.J., concurring in part and dissenting in part).
140 *Id.* at 2866-67 (Rehnquist, C.J., concurring in part and dissenting in part).

tempt.[141] According to Rehnquist, robbery with a firearm was only precluded by the Double Jeopardy Clause because the felony murder statute at issue in that case included proof of a felony as one of its elements.[142] Consequently, the elements of armed robbery were necessary to prove felony murder.[143] In contrast, the elements of contempt did not require proof of a crime; therefore, Chief Justice Rehnquist concluded, *Harris* cannot be read to require an incorporation of the substantive criminal offense into the elements for contempt. In Chief Justice Rehnquist's opinion, this conclusion accorded with decisions of every federal appeals court and state supreme court to consider the question.[144]

Moreover, Chief Justice Rehnquist insisted that Justice Scalia's argument that possession of cocaine and assault were lesser included offenses of contempt was intuitively illogical: contempt is a relatively minor offense, not an aggravated form of possession of cocaine or assault, which are two serious felonies.[145] Additionally, Chief Justice Rehnquist noted that a lesser included offense is one that is by definition "necessarily included" within the statutory elements of another offense.[146] Because a defendant could be found guilty of contempt without satisfying the elements of the substantive crimes of possession of cocaine or assault, the criminal offenses cannot be considered lesser included offenses of contempt.[147]

In sum, Chief Justice Rehnquist believed that none of the offenses against Dixon and Foster were barred by the Double Jeopardy Clause because the elements of contempt were distinct from those of the underlying offenses. Moreover, the Chief Justice believed Justice Scalia's conclusion that the possession of cocaine charge against Dixon and the simple assault charge against Foster

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141 *Id.* at 2867 (Rehnquist, C.J., concurring in part and dissenting in part).

142 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

143 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

144 *Id.* at 2866 (Rehnquist, C.J., concurring in part and dissenting in part) (citing Hansen v. United States, 1 F.2d 316, 317 (7th Cir. 1924) (holding that contempt of court for violating a court order "bears no necessary relation to liability for violating a criminal statute, although both are incurred by the same act"); Orban v. United States, 18 F.2d 374, 375 (6th Cir. 1927) (ruling that a contempt proceeding does not preclude a subsequent criminal prosecution for the same conduct); Commonwealth v. Allen, 486 A.2d 363, 368-71 (Pa. 1984) (holding that a "prosecution on [a] substantive criminal charge after a finding of contempt in violation of [a court order] does not violate double jeopardy"), *cert. denied*, 474 U.S. 842 (1985); People v. Totten, 514 N.E.2d 959, 963-65 (Ill. 1987) (holding that a criminal prosecution for aggravated battery is not precluded by a previous contempt prosecution for the same conduct)).

145 *Id.* at 2868 (Rehnquist, C.J., concurring in part and dissenting in part).

146 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

147 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

were lesser included offenses of contempt defied logic and was contrary to the definition of a lesser included offense.

C. JUSTICE WHITE'S OPINION

Justice White agreed with the majority's decision that the *Blockburger* test mandated that the drug charge against Dixon and the simple assault charge against Foster be dismissed.[148] However, he dissented from Part III(B) of Justice Scalia's opinion, which held that the *Blockburger* test did not bar the prosecution of Foster for assault with intent to kill and for threatening his wife.[149] Justice White believed that the *Blockburger* test barred both of these charges because "the offenses at issue were either identical to, or lesser included offenses of, those charged in the subsequent prosecutions."[150] Because Justice White believed the *Blockburger* test disposed of all the charges against Dixon and Foster, he concluded that there was no need for the Court even to address the *Grady* decision. He therefore dissented from the majority's decision to overturn it.[151]

Before coming to these conclusions, Justice White felt it was first necessary to systematically refute the government's arguments that the Double Jeopardy Clause did not bar the criminal prosecutions of Dixon and Foster.[152] First, the government had alleged that the Double Jeopardy Clause was inapplicable to nonsummary contempt proceedings and had cited three Supreme Court decisions, *In re Debs*,[153] *In re Chapman*,[154] and *Jurney v. MacCracken*,[155] to support this contention.[156] Justice White, however, pointed out that because the relevant portion of *In re Debs* had been effectively reversed by the Court's decision in *Bloom v. Illinois*,[157] it offered no support for the

148 *Id.* at 2868-89 (White, J., concurring in part and dissenting in part).

149 *Id.* at 2869 (White, J., concurring in part and dissenting in part).

150 *Id.* at 2874 (White, J., concurring in part and dissenting in part).

151 *Id.* at 2869 (White, J., concurring in part and dissenting in part).

152 *Id.* at 2869-74 (White, J., concurring in part and dissenting in part). Justice Scalia declined to thoroughly refute the government's arguments because he felt that "it [is] unnecessary, and indeed undesirable, to address at any greater length than we have arguments based on dictum and inapplicable doctrines." *Id.* at 2858 n.4.

153 158 U.S. 564 (1895) (ruling that certain contempt proceedings were exempt from providing defendants with constitutional protections).

154 166 U.S. 661 (1897) (ruling that a witness who refuses to testify before Congress is subject to contempt charges).

155 294 U.S. 125 (1955) (ruling that Congress has the power to bring contempt proceedings against and punish witnesses who refuse to testify).

156 *Dixon*, 113 S. Ct. at 2869 (White, J., concurring in part and dissenting in part).

157 391 U.S. 194 (1968) (ruling that defendants have the right to a jury trial in all criminal proceedings).

government's position.[158] Moreover, Justice White noted that both *In re Chapman* and *Jurney* involved summary contempt proceedings, in which courts' powers are not subject to constitutional restraints, and consequently were not controlling in decisions regarding nonsummary proceedings.[159] Therefore, Justice White concluded that the Double Jeopardy Clause applies to nonsummary contempt proceedings.[160]

Next, the government had argued that the contempt charges and the substantive criminal charges were distinct offenses because they protect different interests: contempt preserves the courts' authority, while criminal statues protect the public's safety.[161] Justice White, however, argued that while the offenses may protect distinct interests, this is simply an indicia of legislative intent and consequently should only be considered in determining the constitutionality of multiple punishments for the "same" offense. Since *Dixon* was a successive prosecution case, the defendant's interest in being protected from multiple trials is primary and would override both the interests of the court and the criminal justice system.[162]

The government and amici both had asserted that applying the Double Jeopardy Clause to contempt proceedings would undermine judicial authority. Courts, they feared, would be unwilling to enforce their orders out of concern that enforcement would preempt the possibility of a subsequent criminal trial for the underlying offense and thus allow criminals to escape serious punishment.[163] Justice White dismissed this argument by explaining that courts possess alternative powers, such as revocation of bail, which would en-

158 *Dixon*, 113 S. Ct. at 2869 (White, J., concurring in part and dissenting in part).

159 *Id.* (White, J., concurring in part and dissenting in part). Justice Scalia agreed with this reasoning and conclusion. *Id.* at 2857.

160 *Id.* at 2870 (White, J., concurring in part and dissenting in part).

161 *Id.* (White, J., concurring in part and dissenting in part); Justice Blackmun accepted this argument in his opinion. *Id.* at 2880 (Blackmun, J., concurring in part and dissenting in part); *see also infra* notes 181-83 and accompanying text.

162 *Dixon*, 113 S. Ct. at 2871 (White, J., concurring in part and dissenting in part). Justice White acknowledged that the doctrine of dual sovereignty, which allows successive prosecutions for the same offense if the governmental entities that bring the charges derive their punitive authority from distinct sources, subordinates the defendant's rights to the government's interest in prosecuting criminals. However, he concluded that *Dixon* did not implicate dual sovereignty because the courts in this case derived their authority to punish contempt and statutory offenses from the same entity—Congress. *Id.* at 2870-71 (White, J., concurring in part and dissenting in part).

163 *Id.* at 2872 (White, J., concurring in part and dissenting in part). Justice Blackmun agreed with this position. *Id.* at 2880 (Blackmun, J., concurring in part and dissenting in part); *see also infra* note 184 and accompanying text. Justice Scalia, however, believed it was inappropriate to determine whether the Double Jeopardy Clause applies to a situation depending on its practical considerations and, therefore, declined to address these issues in his opinion. *Dixon*, 113 S. Ct. at 2858 n.4.

able them to preserve their authority without exposing future prosecutions to a possible Double Jeopardy bar.[164] Moreover, Justice White noted that prosecutors could elect to try the contempt and the criminal charge in the same proceeding,[165] thus avoiding the possibility of double jeopardy and preserving the interests of both the courts and the criminal justice system.[166]

After dismissing the government's arguments that the Double Jeopardy Clause did not apply to the contempt proceedings in *Dixon*, Justice White argued that all the charges against Dixon and Foster were barred by the *Blockburger* test.[167] Justice White reasoned that the court orders merely "triggered the court's authority to punish the defendant[s] for acts already punishable under criminal laws."[168] Therefore, he "put aside" the court orders and compared the elements of the substantive offenses charged in the contempt and the criminal prosecutions.[169] This method of analysis led Justice White to conclude that the offenses charged in the criminal indictments were either identical to, or the aggravated forms of, the offenses prosecuted in the contempt proceeding and thus were precluded by the Double Jeopardy Clause.[170]

Justice White admitted that comparing the elements of contempt to the elements of the offenses charged in a criminal indictment, as Justice Scalia did, may be appropriate in multiple punishment cases. However, he believed a strict *Blockburger* analysis was inadequate in cases involving successive prosecutions.[171] Specifically, Justice White believed that allowing the prosecution of Foster for both the assault and the threat charges would subject him to the dangers of double jeopardy because he would be faced with the

164 *Id.* at 2872 (White, J., concurring in part and dissenting in part).

165 Justice White conceded that victims of domestic violence often rely upon the speed of a contempt proceeding to protect them from their abuser but asserted that the interests of the victim could be protected by arresting the offender for violation of the protection order and holding him without bail. Thus, there would be no need for an immediate contempt proceeding which could preclude a subsequent criminal trial. *Id.* at 2874 (White, J., concurring in part and dissenting in part).

166 *Id.* at 2873 (White, J., concurring in part and dissenting in part). Justice White cited the facts of Dixon's case as support for this conclusion. The same prosecutor who requested the court to hold Dixon in contempt was also responsible for trying the cocaine charge; thus, there would have been no difficulty in coordinating the two prosecutions. *Id.* (White, J., concurring in part and dissenting in part).

167 *Id.* at 2874-76 (White, J., concurring in part and dissenting in part).

168 *Id.* at 2876 (White, J., concurring in part and dissenting in part).

169 *Id.* (White, J., concurring in part and dissenting in part).

170 *Id.* at 2875 (White, J., concurring in part and dissenting in part).

171 *Id.* at 2876 (White, J., concurring in part and dissenting in part).

"embarrassment" and "expense" of numerous trials.[172] Moreover, regarding the threat counts, Foster would face the increased chance of an erroneous conviction because, even though he previously had been acquitted of these offenses, another trial would give the government an opportunity to "fine-tun[e]" its prosecution to obtain a conviction.[173]

Finally, Justice White argued that a strict application of the *Blockburger* test causes "illogical" and "harmful" consequences in successive prosecution cases.[174] According to the Federal Rules of Criminal Procedure, a defendant charged with an aggravated form of an offense, such as assault with intent to kill, may be convicted of the lesser included offense, such as simple assault, even if he was not specifically charged with the lesser offense because at trial the jury is required to return a verdict on all lesser included offenses.[175] Therefore, if the government could bring charges against Foster for assault with intent to kill, it could obtain a conviction against Foster for simple assault, despite the fact that the Double Jeopardy Clause prevented it from charging him with simple assault.[176] Justice White argued that this result was both "unjustifiable" and "pernicious" and reasoned that since the government could not constitutionally charge Foster with simple assault, neither should it be able to charge him with assault with intent to kill.[177] Because Justice White believed that the *Blockburger* test disposed of all the charges, he argued that the "same conduct" test should not even be an issue in the case and dissented from the majority's decision to overturn *Grady*.[178]

D. JUSTICE BLACKMUN'S OPINION

Justice Blackmun concurred with the majority's decision that the Double Jeopardy Clause did not preclude the assault with intent to kill charge and the threat charges against Foster.[179] However, he dissented from the majority's decision that the Double Jeopardy

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172 *Id.* at 2877 (White, J., concurring in part and dissenting in part) (citing Green v. United States, 355 U.S. 184, 187 (1957)).

173 *Id.* (White, J., concurring in part and dissenting in part) (citing Tibbs v. Florida, 457 U.S. 31 (1982); Arizona v. Washington, 434 U.S. 497 (1978)).

174 *Id.* (White, J., concurring in part and dissenting in part).

175 *Id.* (White, J., concurring in part and dissenting in part) (citing FED. R. CRIM. P. 31(c)).

176 *Id.* at 2878 (White, J., concurring in part and dissenting in part). Justice Scalia disputed this conclusion, arguing that under *Blockburger*, "Foster may neither be tried a second time . . . nor again convicted for assault." *Id.* at 2859 n.7.

177 *Id.* at 2878 (White, J., concurring in part and dissenting in part).

178 *Id.* (White, J., concurring in part and dissenting in part).

179 *Id.* at 2879 (Blackmun, J., concurring in part and dissenting in part).

Clause mandated that the charge against Dixon and the simple assault charge against Foster be dismissed.[180] Justice Blackmun reached these conclusions by reasoning that since the contempt charges and the criminal charges protect distinct interests, they were not the "same."[181] Thus, he concluded, the criminal prosecution of Dixon and Foster did not constitute double jeopardy. Justice Blackmun cited the Court's ruling in *Young v. ex rel. Vuitton et Fils, S.A.*,[182] which stated the sole purpose of contempt proceedings is to vindicate the authority of the courts, not to punish criminal offenses.[183] Moreover, Justice Blackmun argued that because contempt is one of the only mechanisms courts have to vindicate their authority, the Court's "willingness to overlook the unique interests served by contempt proceedings . . . will undermine [the courts'] ability to respond effectively to unmistakable threats to their own authority and those who have sought the [courts'] protection."[184]

E. JUSTICE SOUTER'S OPINION

Justice Souter, joined by Justice Stevens, concurred with the majority's conclusion that the charges against Dixon and the assault charge against Foster were barred.[185] However, he dissented from the majority's conclusion with respect to the charges against Foster for assault with intent to kill and for threatening his wife because Justice Souter believed those charges were precluded by the Court's decision in *Grady*.[186] Moreover, Justice Souter dissented from the Court's decision to overturn *Grady* because, in his view, it was well grounded in the Court's double jeopardy jurisprudence and provided defendants with protection from the dangers associated with subsequent prosecutions.[187]

Justice Souter began his analysis with an overview of the interests the Double Jeopardy Clause was designed to serve. He concluded that the Clause serves disparate interests in multiple punishment and successive prosecutions cases.[188] In multiple pun-

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180 *Id.* (Blackmun, J., concurring in part and dissenting in part).

181 *Id.* at 2880 (Blackmun, J., concurring in part and dissenting in part).

182 481 U.S. 787 (1987) (holding that while district courts have the power to appoint a private attorney to prosecute criminal contempt charges, they should refrain from appointing a private prosecutor until the appropriate prosecuting authority declines the court's request to prosecute).

183 *Dixon*, 113 S. Ct. at 2880 (Blackmun, J., concurring in part and dissenting in part).

184 *Id.* (Blackmun, J., concurring in part and dissenting in part).

185 *Id.* at 2890 (Souter, J., concurring in part and dissenting in part).

186 *Id.* at 2881 (Souter, J., concurring in part and dissenting in part).

187 *Id.* (Souter, J., concurring in part and dissenting in part).

188 *Id.* (Souter, J., concurring in part and dissenting in part).

ishment cases, the Double Jeopardy Clause ensures that a defendant does not receive more punishment than is legislatively authorized.[189] Thus, in ruling on a claim of multiple punishment, courts should examine the elements of the two offenses, as defined by the legislature, to determine whether the legislature intended to impose multiple punishments for offenses arising out of the same conduct.[190] Because the *Blockburger* test focuses on the elements of the offenses charged, Justice Souter advocated it as the appropriate test for this determination.[191]

In successive prosecution cases, however, the Double Jeopardy Clause precludes the government from " 'mak[ing] repeated attempts to convict an individual . . . thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.' "[192] Moreover, the Clause reduces the possibility of an erroneous conviction because it prevents the government from perfecting its trial presentation and strategy during numerous prosecutions.[193] Justice Souter argued that an examination of the elements of the offenses charged in successive prosecution cases, as the *Blockburger* test requires, is inadequate because theoretically "the government could manipulate the definitions of offenses, creating fine distinctions among them and permitting a zealous prosecutor to try a person again and again for essentially the same criminal conduct."[194] Justice Souter maintained that the Double Jeopardy Clause is "not so fragile that it can be avoided by finely drafted statutes and carefully planned prosecutions."[195]

Justice Souter believed that a line of cases beginning with *In re Nielsen* demonstrates the Court's consistent recognition of the inadequacy of *Blockburger* and its willingness to look to the defendant's conduct in ruling on successive prosecution cases.[196] Quoting the *Nielsen* Court's language that when "a person has been tried and

189 *Id.* (Souter, J., concurring in part and dissenting in part).

190 *Id.* (Souter, J., concurring in part and dissenting in part).

191 *Id.* at 2882 (Souter, J., concurring in part and dissenting in part).

192 *Id.* at 2883 (Souter, J., concurring in part and dissenting in part) (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

193 *Id.* (Souter, J., concurring in part and dissenting in part) (citing Tibbs v. Florida, 457 U.S. 31, 41 (1982)).

194 *Id.* (Souter, J., concurring in part and dissenting in part). Justice Scalia argued that this danger is unrealistic because of Ashe v. Swenson, 397 U.S. 435 (1970), in which the Court held that factual issues determined in favor of a defendant cannot be relitigated in a subsequent trial. Moreover, conflicting demands on the government's resources and time may prevent numerous attempts at conviction. *Id.* at 2863-64 n.14.

195 *Id.* at 2890 (Souter, J., concurring in part and dissenting in part).

196 *Id.* at 2884 (Souter, J., concurring in part and dissenting in part).

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," Justice Souter contended that the Court barred the adultery charge because it required proof of the same conduct as cohabitation, not because it was a lesser included offense of cohabitation, as Justice Scalia maintained.[197] Moreover, Justice Souter pointed out that adultery could not be a lesser included offense of cohabitation because it required proof of marriage, whereas cohabitation did not. By choosing to focus on the conduct rather than on the elements of the offense, Justice Souter argued that the *Nielsen* Court effectively rejected the use of the "same elements" test in successive prosecution cases.[198]

Justice Souter further insisted that the modern Court's subsequent prosecution jurisprudence recognizes the inadequacy of the *Blockburger* test and examines the underlying conduct in ruling on double jeopardy claims.[199] As proof for this contention, he cited a footnote in *Brown v. Ohio* for the proposition that " '[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense.' "[200] Because the Court cited *Nielsen* for this proposition, Justice Souter reasoned that the *Brown* Court had interpreted *Nielsen* as supporting the "same conduct" test. Thus, Justice Souter concluded, *Grady* has historical foundations.[201]

Justice Souter found additional support in *Harris v. Oklahoma*.[202] In *Harris*, the Court concluded that a prosecution for armed robbery was barred by the Double Jeopardy Clause because the defendant previously had been prosecuted for the greater offense, felony murder, in connection with the same robbery.[203] For Justice Souter, the Court's analysis "turned on considering the prior conviction in terms of the conduct actually charged," rather than focusing on the elements of the crimes.[204] In his view, if the Court had strictly applied the *Blockburger* test, the subsequent prosecution for robbery

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197 *Id.* at 2885-86 (Souter, J., concurring in part and dissenting in part) (quoting *In re* Nielsen, 131 U.S. 176, 188 (1889)). Justice Scalia disputed this interpretation of the passage, arguing that the context and the literal definition of the word "incident" indicate that the Court was focusing on the elements of the crimes, not the conduct. *Id.* at 2861 n.10.

198 *Id.* at 2886 (Souter, J., concurring in part and dissenting in part).

199 *Id.* (Souter, J., concurring in part and dissenting in part).

200 *Id.* (Souter, J., concurring in part and dissenting in part) (quoting Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977).

201 *Id.* at 2887 (Souter, J., concurring in part and dissenting in part).

202 433 U.S. 682 (1977).

203 *Dixon*, 113 S. Ct. at 2887 (Souter, J., concurring in part and dissenting in part).

204 *Id.* (Souter, J., concurring in part and dissenting in part).

with a firearm would have been permitted because felony murder required proof of a killing and armed robbery did not; likewise, robbery with a firearm required proof of a use of a gun, and felony murder did not.[205] Thus, Justice Souter interpreted *Harris* as "follow[ing] the holding in *Nielsen* and conform[ing] to the statement . . . in *Brown*, that the *Blockburger* test is not the exclusive standard for determining whether the rule against successive prosecutions applies in a given case."[206]

Justice Souter found further support for his interpretation of *Nielsen* in *Illinois v. Vitale*.[207] In deciding to remand, the *Vitale* Court noted that if the government must prove that the defendant failed to slow in order to obtain a conviction for manslaughter, the defendant would have a "substantial" double jeopardy claim since he had already been tried for that conduct.[208] Because the Court cited *Harris* for this proposition, Justice Souter argued that the Court must have interpreted *Harris* to mean that "when one has already been tried for a crime comprising certain conduct, a subsequent prosecution seeking to prove the same conduct is barred by the Double Jeopardy Clause."[209] Therefore, Justice Souter contended that in the twentieth century the Court has repeatedly looked to the underlying conduct in determining whether the Double Jeopardy Clause bars a subsequent prosecution.[210]

Finally, Justice Souter asserted that, even if the precedents were inconclusive, the question was settled in *Grady*. In *Grady*, the Court unequivocally held 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."[211] Moreover, Justice Souter could find no justification for the majority's decision to overturn *Grady*.[212] In his view, the cases the majority cited as proof that *Grady* was unworkable in application offered inadequate justification to upset the principle of stare

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205 *Id.* (Souter, J., concurring in part and dissenting in part). Justice Scalia argued that *Harris* does not offer support for the "same conduct" test because the Court's analysis focused on the elements of the offenses and did not even discuss the defendant's conduct. *Id.* at 2861.

206 *Id.* at 2887 (Souter, J., concurring in part and dissenting in part).

207 Illinois v. Vitale, 447 U.S. 410 (1987).

208 *Id.* at 420.

209 *Dixon*, 113 S. Ct. at 2888 (Souter, J., concurring in part and dissenting in part).

210 *Id.* (Souter, J., concurring in part and dissenting in part).

211 *Id.* (Souter, J., concurring in part and dissenting in part) (citing Grady v. Corbin, 495 U.S. 508, 510 (1990)).

212 *Id.* at 2889 (Souter, J., concurring in part and dissenting in part).

decisis. Thus, he dissented from the decision to overturn *Grady*.[213]

After arguing that *Grady* was a sound decision, Justice Souter applied the *Grady* test to facts of *Dixon*. Justice Souter argued that an exclusive application of the *Blockburger* test would allow a criminal prosecution of Dixon for the drug charge because contempt and possession of cocaine with intent to distribute technically contain different elements.[214] However, under *Grady* the criminal prosecution would be precluded because Dixon had already been prosecuted for this conduct.[215] Similarly, Justice Souter concluded that the prosecution of Foster for simple assault would be barred because he had already been convicted of this charge. In regard to the charges against Foster for assault with intent to kill and for threatening his wife on three separate occasions, Justice Souter argued that while they may be permissible under the *Blockburger* test, they were barred by *Grady* because they were based on the same conduct for which Foster had already been tried in the contempt proceeding.[216]

Justice Souter concluded by arguing that the *Grady* "same conduct" test has roots dating to the late 1800s.[217] Thus, Souter reasoned that the Court could not eliminate the "same conduct" test "from our constitutional jurisprudence" simply by overturning *Grady*. In addition, the court must overrule a number of cases, including *Nielsen, Harris*, and *Vitale*.[218] Because Justice Souter refused to do that, he would have upheld the decision of the court of appeals.[219]

V. ANALYSIS

This Note argues that Justice Scalia and Justice Souter's debate over whether the *Blockburger* test or the *Grady* test best articulates the Court's historical double jeopardy jurisprudence is an exercise in futility. Rather than focusing on historical applications of the clause, the Court should clearly identify the interests that the Clause is intended to protect and develop a test that best protects those

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213 *Id.* (Souter, J., concurring in part and dissenting in part). Justice Souter opined that the *Grady* "rule is straightforward, and a departure from it is not justified by the fact that two Court of Appeals decisions have described it as difficult to apply." *Id.* (Souter, J., concurring in part and dissenting in part).

214 *Id.* at 2890 (Souter, J., concurring in part and dissenting in part). In reaching this conclusion, Justice Souter used analysis similar to that of Chief Justice Rehnquist. *See supra* notes 138-40 and accompanying text.

215 *Dixon*, 113 S. Ct. at 2890 (Souter, J., concurring in part and dissenting in part).

216 *Id.* at 2891 (Souter, J., concurring in part and dissenting in part).

217 *Id.* (Souter, J., concurring in part and dissenting in part).

218 *Id.* (Souter, J., concurring in part and dissenting in part).

219 *Id.* (Souter, J., concurring in part and dissenting in part).

interests in the context of today's society and criminal justice system.[220]

A. THE IRRELEVANCE OF THE DOUBLE JEOPARDY CLAUSE'S HISTORY

The Court's double jeopardy jurisprudence "can hardly be characterized as [a] model[] of consistency and clarity."[221] This inconsistency and confusion is caused by the Court's repeated attempts to ensure that its holdings comport with the history of the clause.[222] A historical approach to double jeopardy analysis is misplaced for three reasons: the definitional nature of crimes has substantially changed over time, the criminal justice system has changed over time, and the framers' intent behind the clause is ambiguous. Under English and early American common law, the number of offenses for which a defendant could be charged was extremely limited,[223] and the offenses were broad in scope.[224] Today, however, there are countless offenses distinguishable only by fine nuances. Therefore, a modern prosecutor could prosecute a defendant repeatedly simply by making minor alterations to the criminal charges each time.[225] Moreover, at common law the conviction rate was extremely high and most convicted felons were either deported or executed. Thus, defendants were rarely prosecuted twice for the same offense.[226]

Additionally, the power of the prosecutor has changed over time.[227] At common law, the prosecutor was restrained by very for-

220 *See* Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1 (1983). The Court has used this approach in interpreting other Amendments, most notably the First Amendment. *Id.* at 16.

221 Burkes v. United States, 437 U.S. 1, 9 (1978); *see also In re* Nielsen, 131 U.S. 176 (1889) (holding that the Double Jeopardy Clause is violated when a defendant is tried twice for the same conduct); Gavieres v. United States, 220 U.S. 338 (1911) (holding that the Double Jeopardy Clause is not violated even if the two charges are based on the same conduct if the two offenses charged have different statutory elements); Grady v. Corbin, 495 U.S. 508 (1990) (holding that courts must look to both the elements of the offenses and the defendant's conduct to determine whether the Double Jeopardy Clause is violated by a subsequent prosecution).

222 McKay, *supra* note 220, at 11-12.

223 At the time the Bill of Rights was ratified there were only 160 offenses. Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 n.14 (1956) [hereinafter *Statutory Implementation*].

224 *Id. See also* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 279 (1965) [hereinafter *Twice in Jeopardy*]; McKay, *supra* note 220, at 14.

225 Thomas, *supra* note 15, at 396.

226 *Statutory Implementation*, *supra* note 223, at 342; *Twice in Jeopardy*, *supra* note 224, at 279.

227 *See* JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 169 (1969).

malistic procedural rules.[228] For instance, if there was any disparity between the facts set forth in the indictment and the evidence presented at trial, the case was dismissed.[229] The prosecutor also was not allowed to amend the indictment.[230] The purpose of these rules was to prevent "arbitrary multiplications of offenses and extension of the criminal law."[231] Today, these formalities are gone, and prosecutors are given broad discretion in prosecuting defendants.[232] Consequently, the Double Jeopardy Clause has great significance in today's society because it is one of the only limitations on the prosecutor's power.[233] Because the definitional structure of crimes and the power of the prosecutor has changed over time, any definition of when two offenses are the same that comports with historical interpretations of the Clause will not adequately protect defendants from double jeopardy in the modern criminal justice system.

Moreover, the legislative history of the Double Jeopardy Clause does not provide any indication of what the Framers meant by the phrase "same offense."[234] In ratifying the clause, the First Congress seemingly intended to adopt an ancient principle of justice that no person should be tried twice for the same offense.[235] Consequently, Congress did not specifically delineate what factors should be examined in determining whether two offenses are the "same."[236] Because the Framers envisioned the prohibition against double jeopardy as a conceptual restraint on government, any attempt to formulate a rigid, mechanical test that comports with the Framers' intent is futile. For the above stated reasons, the common law history of the Double Jeopardy Clause is irrelevant in formulating a test which best protects a defendant from double jeopardy in the context of the modern criminal justice system.[237]

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228 *Id.* at 170-71; McKay, *supra* note 220, at 14.

229 McKay, *supra* note 220, at 14.

230 SIGLER, *supra* note 227, at 170.

231 McKay, supra note 220, at 15 (citing 1 L. RADZINOWICZ, A HISTORY OF THE ENGLISH CRIMINAL LAW 102 n.72 (1948) (quoting J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 293 (1883)).

232 SIGLER, *supra* note 227, at 170-71.

233 *Id.* at 171.

234 *Id.* at 27-34.

235 *Id.* at 1-37.

236 *Id.* at 32.

237 The Court itself has previously indicated that the history of the Clause in not "dispositive in Double Jeopardy Claims." Grady v. Corbin, 495 U.S. 508, 517 n.8 (1990).

B. INTERESTS THAT THE DOUBLE JEOPARDY CLAUSE WAS INTENDED TO PROTECT

Like other protections delineated in the Bill of Rights, the Double Jeopardy Clause was designed to protect individuals from governmental tyranny.[238] The clause accomplishes this goal by ensuring the finality of judicial determinations regarding the individual's guilt or innocence.[239] By guaranteeing finality, the clause provides defendants with numerous protections. First, the clause prevents the government from harassing individuals by ensuring that "the State with all its resources and power [does not] make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[240] Second, by assuring the finality of judicial determinations, the clause minimizes the chances that a defendant will be wrongly convicted upon retrial.[241] If a defendant is prosecuted numerous times for the same offense, the prosecution is given the opportunity to perfect its presentation of evidence and trial strategies, thus increasing the risk of an erroneous conviction.[242] Moreover, repeated prosecutions wear down the defendant and consume his resources, which likewise increase the chances for a wrongful conviction.[243]

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238 *See* Ohio v. Johnson, 467 U.S. 493, 498-99 (1984); Ashe v. Swenson, 397 U.S. 436, 456 (1970); McKay, *supra* note 220, at 15; George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 832-33.

239 *See* Garrett v. United States, 471 U.S. 773, 795 (1985) (O'Connor, J., concurring); *Johnson*, 467 U.S. at 498-99; United States v. DiFrancesco, 449 U.S. 117, 128, 136 (1980); United States v. Jorn, 400 U.S. 470, 479 (1971). *See also* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84.

240 Green v. United States, 355 U.S. 184, 187 (1957). *See also* Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 918 (1957) [hereinafter *Consecutive Sentences*]; Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962, 964 (1980) [hereinafter *Double Jeopardy Bar*].

241 MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 4 (1969).

242 *See* Tibbs v. Florida, 457 U.S. 31, 41 (1982) (noting that the Double Jeopardy Clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction); *accord* Grady v. Corbin, 495 U.S. 508, 518 (1990); *Green*, 355 U.S. at 187. *See also* Ashe v. Swenson, 397 U.S. 436, 447 (1970) (the State admitted in its brief that upon retrial the prosecutor did "what every good attorney would do—he refined his presentation in light of the turn of events at the first trial"); Hoag v. New Jersey, 356 U.S. 464 (1958) (after obtaining an acquittal, the prosecution altered its trial strategy and obtained a conviction in the subsequent proceedings); *Twice in Jeopardy*, *supra* note 224, at 278 (noting that without a guarantee of finality a defendant could be acquitted by numerous juries until the prosecutor convinced one jury to convict).

243 *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (noting that there can be no equal justice where the kind of trial a man gets depends on the amount of money he has); *see also* Donald Eric Burton, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 779, 804 (1988) (noting that the imbalance in resources between the pros-

Because the Double Jeopardy Clause embodies the concept that finality protects defendants from governmental tyranny, the Court should focus on this interest in developing a test for double jeopardy rather than looking to the vague confines of history, as Justice Scalia did, or the Court's inconclusive double jeopardy jurisprudence, as Justice Souter did.[244]

C. FAILURE OF THE *BLOCKBURGER* AND THE *GRADY* TESTS TO ADEQUATELY PROTECT THE INTERESTS THE DOUBLE JEOPARDY CLAUSE WAS INTENDED TO PROTECT

This Note argues that neither the *Blockburger* test nor the *Grady* test adequately insures finality; thus, they fail to protect the interests the Double Jeopardy Clause was designed to serve. The *Blockburger* test's focus on the elements of the offenses charged is inadequate due to the immense number, and overlapping nature, of offenses with which a defendant can be charged.[245] It is conceivable that a prosecutor would divide up a crime in such a way that a defendant could be tried numerous times for the same conduct.[246] In such a scenario, a defendant would be exposed to governmental harassment and the possibility of wrongful conviction.[247]

Further, the *Blockburger* test is inadequate because it was developed to protect an individual from receiving multiple punishments for the same offense, not to prevent vexatious successive prosecu-

ecution and the defense is so great that a defendant will not receive a fair trial if he is subject to numerous prosecutions).

244 McKay, *supra* note 220, at 15.

245 *See* United States v. Dixon, 113 S. Ct. 2848, 2888 (1993) (Souter, J., concurring in part and dissenting in part); *see also* Ashe v. Swenson, 397 U.S. 436, 446 n.10 (1970); Thomas, *supra* note 238, at 98; *Statutory Implementation*, *supra* note 223, at 222; Note, *Double Jeopardy and the Multiple Count Indictment*, 57 YALE L.J. 132, 133 (1947).

246 *Dixon*, 113 S. Ct. at 2883 (Souter, J., concurring in part and dissenting in part); *Consecutive Sentences*, *supra* note 240, at 928 n.43 (noting that a single sale of narcotics could theoretically result in nine distinct prosecutions: (1) purchase of narcotics from an unstamped package; (2) selling narcotics from an unstamped package; (3) dispensing narcotics from an unstamped package; (4) sale of narcotics without a written order form; (5) buying illegally imported narcotics; (6) receiving illegally imported narcotics; (7) concealing illegally imported narcotics; (8) facilitating the transportation of illegally imported narcotics; (9) selling illegally imported narcotics). *See also* Grady v. Corbin, 495 U.S. 508, 520 (1990) (noting that if only the *Blockburger* test were applied to the facts of the case, the defendant could be tried four separate times for one criminal act); *Ashe*, 397 U.S. at 452 (Brennan, J., concurring) (noting that a prosecutor could bring numerous charges if the offense affected several victims, if the criminal action could be divided into chronologically discrete crimes, or if it was illegal under numerous different statutes).

247 Eli J. Richardson, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273, 275 (1992); *Twice in Jeopardy*, *supra* note 224, at 274. *See also Grady*, 495 U.S at 520.

tions.[248] George C. Thomas argues that the most important purpose of the clause is to protect the innocent from wrongful conviction.[249] Because "[t]he existence of a single conviction represents a judgment that the defendant is guilty," the imposition of additional punishment imposes no additional risk that an innocent person will be wrongly convicted.[250] Conversely, a second trial after an initial acquittal increases the chance that the government, with all its power and resources, will be able to obtain a guilty verdict against an innocent defendant.[251] For these reasons, Thomas argues that the protection against multiple prosecution is more fundamental to protecting the innocent than the protection against multiple punishments.[252] Therefore, "it is incongruous to use a test developed to measure the scope of a less fundamental protection as the sole measure of the protection against successive prosecutions."[253]

Moreover, the Supreme Court has acknowledged that the *Blockburger* test is simply a mechanism for determining legislative intent.[254] Discerning legislative intent in successive prosecution cases is irrelevant because a legislature could narrowly define offenses, which would allow a prosecutor to unconstitutionally bring numerous prosecutions against a defendant for what in essence is the same offense against society.[255] Because multiple prosecutions for the same offense are unconstitutional regardless of the legislature's intent, the *Blockburger* test is inapplicable in successive prosecution cases.[256] In sum, the *Blockburger* test cannot adequately protect a defendant from being prosecuted twice for the same offense, as it "was neither designed nor developed for this purpose and is theoretically inappropriate for the task."[257]

While the Court in *Grady* considered the interests protected by the Double Jeopardy Clause and attempted to formulate a test that adequately protected those interests,[258] this Note argues that the

248 Thomas, *supra* note 15, at 371-72.
249 *Id.* at 341-42.
250 *Id.*
251 *Id.*
252 *Id* at 372.
253 *Id.*
254 *See* Albernaz v. United States, 450 U.S. 333, 340 (1981) (stating "[t]he *Blockburger* test is a 'rule of statutory construction' "); Whalen v. United States, 445 U.S. 684, 711 (1980) (Rehnquist, J., dissenting) (noting the *Blockburger* test is simply a mechanism for determining legislative intent).
255 Thomas, *supra* note 15, at 372.
256 *Id.*
257 *Id.*
258 Grady v. Corbin, 495 U.S. 508, 518-19 (1990).

"same conduct" test fails to ensure finality and thus inadequately protects individuals from unconstitutional successive prosecutions. The major deficiency of the *Grady* test lies in its vagueness. In handing down this test, the Court failed to delineate exactly when and how a prosecutor proves "conduct for which a defendant has already been charged."[259] Therefore, "[i]t is not at all apparent how a court is to go about deciding whether the evidence that has been introduced (or that will be introduced) at the second trial 'proves conduct' that constitutes an offense for which the defendant has already been prosecuted."[260] The lack of guidance in applying the test resulted in inconsistent and unclear decisions.[261] This Note argues that the *Grady* test does not protect the interests of finality because it enables a prosecutor to subject a defendant to at least the initial stages of numerous prosecutions in which the government will attempt to bring a second prosecution by fitting its case into one of the exceptions to the *Grady* decision.

In most circumstances a defendant does not know exactly what conduct the prosecution is going to prove at trial until the trial commences. Therefore, a determination of whether a successive prosecution violates the *Grady* test can never be made until the defendant has been forced to undergo the initial stages of a potentially unconstitutional trial.[262] While *Grady* may ensure that a defendant is not twice convicted for the same offense, it does not guarantee that a defendant will not be subjected to the embarrassment, expense and ordeal of the initial stages of a second prosecution until the court can make a double jeopardy determination. As a result, it does not

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259 *Id.* at 541 (Scalia, J., dissenting).

260 *Id.* (Scalia, J., dissenting).

261 *See, e.g.*, United States v. Felix, 503 U.S. 112 S. Ct. 1377 (1992) (creating a large exception to *Grady* by ruling that prosecution for conspiracy is not precluded by a prosecution for an underlying offense); Sharpton v. Turner, 964 F.2d 1284, 1287 (2d Cir. 1992) (noting that the *Grady* test "has proven difficult to apply"), *cert. denied*, 112 S. Ct. 1665 (1992); Lander v. Smith, 941 F.2d 356, 364 (5th Cir. 1991) (noting that "even if [*Grady* is] carefully analyzed and painstakingly administered, [it] is not easy to apply"); United States v. Calderone, 917 F.2d 717 (2d Cir. 1990) (issuing three separate opinions as to how to apply *Grady*), *vacated and remanded*, 112 S. Ct. 1657 (1992); United States v. Exposito, 912 F.2d 60, 65 (3d Cir. 1990) (creating an exception to *Grady* by ruling that prior RICO prosecution does not preclude a subsequent prosecution for a predicate offense), *cert. dismissed*, 498 U.S. 1075 (1991); Eatherton v. State, 810 P.2d 93, 99 (Wyo. 1991) (the majority argued that the *Grady* Court "didn't really develop any new law" regarding successive prosecutions, while the dissent argued that *Grady* required a reversal of the conviction). Thomas also noted that the *Grady* test will create uncertainty. Thomas, *supra* note 15, at 387.

262 *Grady*, 495 U.S. at 529-30 (Scalia, J., dissenting) (arguing that because a defendant has no right to be informed of the evidence the prosecution will present at trial, in most instances the *Grady* test will not prevent a defendant from being exposed to double jeopardy).

provide an appropriate level of protection from governmental harassment.[263]

D. THE SAME TRANSACTION TEST

As explained above, neither the "same elements" test nor the "same conduct" test adequately serves the interests the Double Jeopardy Clause is designed to protect. Therefore, this Note argues that the Court should abandon both of these tests and adopt the "same transaction" test, a test better suited to provide defendants with the requisite protections against double jeopardy. The "same transaction" test requires "the prosecution, except in the most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[264]

This test offers numerous advantages. The finality of a judicial determination would be guaranteed because a prosecutor would not be able to bring additional charges arising out of the same transaction in a subsequent proceeding.[265] Therefore, the government could not harass an individual through repeated prosecutions. This

263 *Twice in Jeopardy*, *supra* note 224, at 275 ("Since a major purpose of the double jeopardy prohibition is to preclude vexatious reprosecution, it is senseless to compel a defendant to undergo the second trial in order to determine whether it is barred.").

264 Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). The limited exception to this test would permit subsequent prosecutions when: (1) the prosecution is unable to bring charges against a defendant at the initial trial because facts necessary to establish that charge have not been discovered despite the prosecutor's diligent efforts; (2) a defendant pleaded guilty or nolo contendre to a lesser charge that occurred in the transaction; (3) courts, due to their limited jurisdiction, are unable to try all the charges together; (4) joinder would be prejudicial to either the defense or the prosecution. *See* Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977) (stating that an exception to the rule that a prosecution for a greater offense is precluded when the defendant had previously been tried for the lesser offense exists when the "State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence"); *see also* Allan D. Vestal & Douglas J. Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic*, 47 Mo. L. REV. 1, 23-25 (1982) (noting that under the "same transaction" test a defendant's plea of guilty or nolo contendre could allow the defendant to escape the appropriate punishment); *Ashe*, 397 U.S. at 453 n.7 (Brennan, J., concurring) (noting an exception to the "same transaction" test should exist when "no single court had jurisdiction of all the alleged crimes"); *Twice in Jeopardy*, *supra* note 224, at 293-95 (noting that joinder should not be required when offenses are so complicated that the jury will confuse the issues or when joinder would affect a defendant's other Fifth Amendment rights, such as the right against self-incrimination).

265 *Ashe*, 397 U.S. at 454 (Brennan J., concurring); William L. Carroway, *Pervasive Multiple Offense Problems—A Policy Analysis*, 1971 UTAH L. REV. 105, 115 (noting that the "same transaction" test is the "most sweeping solution that could be achieved by the Court" and gives the greatest protection to the interests embodied in the Double Jeopardy Clause).

test also reduces the risk of an erroneous conviction because it prevents a prosecutor from perfecting his or her trial strategy. Moreover, the "same transaction" test promotes judicial efficiency and economy by reducing the overall number of trials.[266] Numerous states, either through statutes or case law, have adopted the "same transaction" test, further underscoring the fact that the "same transaction" test is the preferable mechanism for deciding when a subsequent prosecution is barred by the Double Jeopardy Clause.[267]

The advantages of the same transaction test are further highlighted when applied to the factual scenarios presented in *Dixon*. If the Court had applied the "same transaction" test, the criminal prosecutions of both Dixon and Foster would have been barred because the criminal charges arose out of the same transaction as the contempt offenses. Thus, neither defendant would have been subjected to the inconveniences or the harassment of a second trial.[268] Further, the "same transaction" test would eliminate the possibility that Foster would be erroneously convicted for the threat counts (the counts for which he was acquitted in initial contempt proceeding) because the government had the opportunity to rehearse and perfect its trial strategy. Furthermore, as Justice White pointed out, joining the criminal and the contempt proceedings would not undermine the integrity or the authority of the court, since the judiciary retained the power to incarcerate Dixon and Foster until the prosecution was able to try the contempt and the criminal charge together.[269]

Numerous commentators have dismissed the "same transaction" test because, like the *Grady* test, it lacks a precise definition.[270]

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266 *Ashe*, 397 U.S. at 454; Petite v. United States, 361 U.S. 529, 530 (1960); *Double Jeopardy Bar*, *supra* note 240, at 968.

267 *See, e.g.*, MODEL PENAL CODE § 1.07(2)-(3) (1985); COLO. REV. STAT. § 18-1-408(2) (1993); FLA. R. CRIM. P. 3.151 (West 1993), HAW. REV. STAT. § 701-109(2) (1993); MINN. STAT. ANN. § 609.035 (West 1992); MONT. CODE ANN. § 46-11-503 (1993); N.Y. CRIM. PROC. LAW § 40.40 (McKinney 1993); N.C. GEN. STAT. § 15A-926 (1992); OR. REV. STAT. § 131.505-.525 (1991); PA. STAT. ANN. tit. 18, § 109-112 (1983). States that have adopted the "same transaction" test through the judicial process include Michigan (People v. White, 212 N.W.2d 222 (Mich. 1973)), Pennsylvania (Commonwealth v. Campana, 314 A.2d 854, *cert. denied*, 417 U.S. 969 (Pa. 1974)), Tennessee (State v. Covington, 222 S.W. 1, 2 (Tenn. 1920)), Texas (Pascahl v. State, 90 S.W. 878 (Tex. 1908)), and West Virginia (*State ex rel.* Dowdy v. Robinson, 257 S.E.2d 167 (W. Va. 1979)).

268 *But see* Commonwealth v. Allen, 486 A.2d 363 (Pa. 1984) (noting that Pennsylvania has an exception to its compulsory joinder statue which allows successive prosecutions for contempt and the underlying criminal violation arising from the same conduct), *cert. denied*, 474 U.S. 842 (1985).

269 United States v. Dixon, 113 S. Ct. 2849, 2872-74 (White, J., concurring in part and dissenting in part).

270 *See, e.g.*, Otto Kirchheimer, *The Act, The Offense, and Double Jeopardy*, 58 YALE L.J.

They argue that a transaction is a malleable concept; therefore, it enables a prosecutor to create numerous violations of the criminal code from what in reality is a single offense.[271] However, this deficiency is not fatal, as guidance in applying this test can be obtained from the common law. Under the common law principle of res judicata, a claimant is required to adjudicate all claims that can be "conveniently litigated at one trial" in one proceeding, and the claimant cannot retry a factual contention under a different legal theory.[272] Like the same transaction test, res judicata could be labeled an imprecise rule; however, over time courts have developed a body of case law that clearly delineates when claims must be tried together.[273] Similarly, in criminal law, "factual patterns will emerge" that will enable the court "to determine in advance whether reprosecution should be barred" because all charges should have been brought in a single proceeding.[274]

If the Court finds that this process is too unstable or would take too long, the Court instead could delineate a set of specific standards that could be used in determining whether two offenses occurred in the same transaction. One factor could be the defendant's intent in committing the crime.[275] Under this notion, all crimes committed by the defendant that require proof of the same intent and occur in the same proximate time frame must be tried together.[276] Another factor that could be used to define a transaction is the notion of a continuous offense.[277] Under this concept, once a defendant has created an illegal situation, all further violations of the law are considered part of that transaction until the defendant takes positive steps to rectify the situation or until external factors terminate the situation.[278] Driving while intoxicated provides an example of how this method would work. Once a drunk driver gets behind the wheel of a car, he creates an illegal situation, and any crimes committed while he is driving in this intoxicated state must be tried together. However, if he regains sobriety and commits additional crimes, these new offenses need not be tried with the crimes

534, 539-40 (1949); *The Supreme Court, 1989 Term: Leading Cases: I. Constitutional Law; A. Criminal Law and Procedure*, 104 HARV. L. REV. 149, 157 (1990); *Twice in Jeopardy*, *supra* note 224, at 276; Westen & Drubel, *supra* note 239, at 114.

271 *Double Jeopardy Bar*, *supra* note 240, at 968; *Statutory Implementation*, *supra* note 223, at 348-49.

272 *Twice in Jeopardy*, *supra* note 224, at 296.

273 *Id.* at 297.

274 *Id.*; Ashe v. Swenson, 397 U.S. 436, 454 n. 8 (1970).

275 Kirchheimer, *supra* note 270, at 540.

276 *Id.* at 541.

277 *Id.* at 540.

278 *Id.* at 540-41.

committed while the defendant was intoxicated, because the initial situation was terminated by the sobriety.[279]

The main point that the Court should recognize is that while the "same transaction" test could be labeled as imprecise, it is amenable to being further definition either through the development of case law or by judicial guidelines. Therefore, because the "same transaction" test affords defendants the greatest protection against double jeopardy and because it can, through judicial interpretation, be precisely defined, the Court in future cases should adopt the "same transaction" test.

VI. CONCLUSION

The *Dixon* Court definitively ruled that the *Blockburger* test was the appropriate mechanism for determining when successive prosecutions for the same conduct violate the Double Jeopardy Clause. However, by adopting this test, the Court did a great injustice to defendants, because the *Blockburger* test does not adequately protect them from the evils of double jeopardy. Justice Scalia attempted to justify the adoption of the *Blockburger* test by stating that it comports with how the Court has historically interpreted and applied the Double Jeopardy Clause. Whether or not this is true, the approach the Court has historically used in double jeopardy claims is irrelevant today because the definition of crimes and the nature of the criminal justice system has changed dramatically in the last century.

This Note argues that the Court needs to refrain from engaging in largely esoteric debates over the precedential value of vague and confusing cases and instead should develop a test that adequately protects the interests the clause was designed to serve—namely protecting citizens from governmental tyranny. This Note argues that the "same transaction" test accomplishes this goal because it insures finality by reducing the possibility that a defendant can be tried numerous times for the same offense. Therefore, this Note urges the Court to adopt the "same transaction" test, or at least adequately justify why it refuses to do so.

KIRSTIN PACE

279 *See id.*