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Criminal Rico and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This Rico's Achilles' Heel

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CRIMINAL RICO AND DOUBLE JEOPARDY ANALYSIS IN THE WAKE OF *GRADY v. CORBIN*: IS THIS RICO'S ACHILLES' HEEL?

Congress enacted Title IX of the Organized Crime Control Act ("RICO")[1] to curtail the extensive infiltration of organized crime into legitimate business.[2] RICO's broadly defined provisions enhance penalties[3] and create new substantive offenses[4] which aug-

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1 RICO is an acronym for "Racketeer Influenced and Corrupt Organizations" and is Title IX of the Organized Crime Control Act ("OCCA") of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1988)). OCCA contains twelve substantive titles: Title 1, Special Grand Jury, 18 U.S.C. §§ 3331-3334 (1988); Title II, General Immunity, *id.* §§ 6001-6005; Title III, Recalcitrant Witnesses, 28 U.S.C. § 1826 (1988); Title IV, False Declarations, 18 U.S.C. § 1623; Title V, Protected Facilities for Housing Government Witnesses, *id.* § 3481; Title VI, Depositions, *id.* § 3503; Title VII, Litigation Concerning Sources of Evidence, *id.* § 3504; Title VIII, Syndicated Gambling, *id.* § 1511; Title X, Dangerous Special Offender Sentencing, *id.* §§ 3575-3578; Title XI, Regulation of Explosives, *id.* §§ 841-848; Title XII, National Commission of Individual Rights, *id.* § 3331.

2 Section 1 of the Organized Crime Control Act, *Statement of Findings and Purposes*, provides:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Organized Crime Control Act of 1970, Statement of Findings and Purposes, 84 Stat. 922, *reprinted in* 1970 U.S.C.C.A.N. 1073. *See infra* notes 16-24 and accompanying text.

3 18 U.S.C. § 1963 (1988) describes the criminal penalties for violations of RICO substantive offenses. These penalties include fines as high as $25,000, a prison term of up to twenty years, and forfeiture of all property and interests in an enterprise, as defined under 18 U.S.C. § 1961(4) (1988). Section 1963 enhances the punishment which may be imposed on an individual, because it permits higher fines and longer prison terms for a RICO conviction than allowed for a single misdemeanor or felony offense. For an in-depth treatment of the interplay between civil penalties, like forfeiture, and criminal penalties, see generally Mary M. Chen, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

4 18 U.S.C. § 1962 (1988) describes the substantive offenses for RICO, providing in pertinent part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which engages in, or the activities of which affect, interstate or foreigu commerce . . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

ment a state's criminal prosecution resources. These substantive offenses are a unique feature of the statute because they punish an offender for engaging in a *pattern* of criminal activity, individual instances of which are already proscribed by state and federal penal laws.[5] Recent RICO prosecutions demonstrate a trend towards a liberal construction of the Act's provisions.[6] This development

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(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

5 *See infra* notes 20-37 and accompanying text.

6 RICO also contains a liberal construction clause, Title IX, § 904, 84 Stat. 947 (codified at 18 U.S.C. § 1961 (1988)), providing in pertinent part:

(a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

Courts have consistently cited the Liberal Construction clause in support of expanding the scope of RICO prosecutions. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985) ("RICO is to be read broadly. This is the lesson not only of Congress' self-consciously extensive language and overall approach . . . but also of its express admonition that RICO is to be 'liberally construed to effectuate its remedial purposes.' "); Russello v. United States, 464 U.S. 16, 26-27 (1983) (legislative history reveals Congress intended RICO provisions to be liberally construed); United States v. Turkette, 452 U.S. 576, 587-593 (1980) (RICO's liberal construction clause and legislative history do not prescribe a limited reading of the word "enterprise"); United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir.) ("Our analysis of section 1962(d) is gnided by [the] rules of RICO construction . . . [T]he Supreme Court has consistently adhered to a broad, literal reading of the statute."), *cert. denied*, 479 U.S. 939 (1986); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3rd Cir. 1977) ("We note at the outset that Congress specifically directed that the provisions of RICO 'shall be liberally construed to effectuate its remedial purposes' [and] Courts have interpreted RICO in accordance with this Congressional mandate"); United States v. Frumento, 563 F.2d 1083, 1090-91 (3rd Cir. 1977) ("Congress had no reason to adopt a constricted approach [towards RICO]. . . . We refuse to believe that Congress had such 'tunnel-vision'. . . ."), *cert. denied*, 434 U.S. 1072 (1978); United States v. Kaye, 556 F.2d 855, 859 (7th Cir.) ("It was the intent of Congress that the provisions of the Organized Crime Control Act of 1970 be liberally construed. . . ."), *cert. denied*, 434 U.S. 921 (1977).

See generally G. Robert Blakey & Brian Gettings, *Racketeer Influenced & Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1032-33 (1980) ("[T]he policy Congress properly mandated for the construction of RICO is one of a generous, rather than a parsimonious reading of its promise of new criminal and civil remedies."); William D. Fearnow, Note, *RICO: Are the Courts Construing the Legislative History Rather than the Statute Itself?*, 55 NOTRE DAME LAW. 777, 783 (1980) ("If a court can, in good faith, find no basis for a restrictive interpretation . . . the wording of the statute [sh]ould allow . . . a broad interpretation."); Craig W. Palm, Note *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 168 (1980) ("To strengthen RICO's effectiveness, Congress included a unique liberal construction clause, mandating that 'the provisions of this title shall be liberally construed to effectuate its remedial purposes.' Most courts have followed tbe directive and interpreted RICO broadly"); Barry Tarlow, *RICO: The New Darling of The Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 169

raises several important constitutional issues, particularly in the area of double jeopardy analysis.

The Double Jeopardy Clause dictates that no person will "be twice put in jeopardy of life or limb" for the same offense.[7] In *Blockburger v. United States*,[8] the Supreme Court abandoned the common-law "same evidence" rule[9] and established a constitutional standard termed the "same offense" test. This test requires courts to compare the statutory elements of each crime for which a defendant is prosecuted; if the statutory elements are identical, the defendant is being unconstitutionally prosecuted for the "same" offense. Recently, in *Grady v. Corbin*,[10] the Supreme Court significantly modified double jeopardy analysis by implementing a "conduct" test, which focuses on the acts underlying the criminal charge rather than the statutory elements of the offense. This conduct test gives defendants strong protection under the Double Jeopardy Clause. However, a literal application of *Grady* in RICO cases creates potentially anomalous results and is inconsistent with the goals of RICO.

Part I of this Note briefly summarizes the structure of RICO and the history of double jeopardy analysis, with particular focus on *Blockburger* and its progeny.[11] Part II discusses *Grady* and highlights Justice Scalia's poignant dissent on the practical implications of the majority's "conduct" test.[12] Part III analyzes the potential effects of the *Grady* conduct test when applied to RICO and argues that effective prosecution of RICO offenses necessarily infringes on individual constitutional rights.[13] This Part also reviews recent decisions construing *Grady*, which indicate that the Supreme Court will ultimately have to reformulate the conduct test in order to provide a consistent standard for lower courts to follow.[14] In light of the Tenth Circuit decision in *United States v. Felix*,[15] presently pending

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(1980) ("The government, encouraged by recent cases broadly construing Title IX, has . . . urg[ed an] even broader construction[].").

7 The Fifth Amendment of the United States Constitution states:

> "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law'. . ."

U.S. CONST. amend. V.

The Double Jeopardy Clause applies to states through the Due Process Clause of the Fourteenth Amendment. *See* Benton v. Maryland, 395 U.S. 784 (1969), *overruling* Palko v. Connecticut, 302 U.S. 319 (1937).

8 284 U.S. 299 (1932).

9 *See infra* note 48.

10 110 S. Ct. 2084 (1990).

11 *See infra* notes 16-101 and accompanying text.

12 *See infra* notes 101-54 and accompanying text.

13 *See infra* notes 155-167 and accompanying text.

14 *See infra* notes 168-88 and accompanying text.

15 926 F.2d 1522 (10th Cir.), *cert. granted*, 112 S. Ct. 47 (1991).

before the Supreme Court, and the tension between criminal RICO and the *Grady* conduct test, the appropriate solution is to confine *Grady* to its facts or construe the decision as inapplicable in a RICO context.

I
BACKGROUND

A. RICO—The Statute

1. *Purpose*

When congressional leaders proposed the comprehensive Organized Crime Control Act of 1970 ("OCCA"), their intent was to effectuate a single important goal: eradicate the effects of organized crime on legitimate business.[16] Extensive legal research confirmed that organized crime pervaded every facet of American life, including the national economy, interstate commerce, and government.[17]

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16 Senator John L. McClellan, one of the driving forces behind the OCCA, stated the OCCA's purpose:

> Our society cannot . . . safely permit the operation within it of an underworld organization as powerful and as immune from social accountability as La Cosa Nostra. The success story of this group is symbolic of the breakdown of law and order increasingly characteristic of our society. To hold the allegiance of the now law abiding, society must show each man that no man is above the law. . . . [I]t is to this end that [the OCCA] was carefully drafted.

116 CONG. REC. 18,913 (1970) (statement of Sen. John L. McClellan).

17 Prior to the 1970 enactment of the OCCA, the nature of organized crime and its effects on legitimate business had been extensively researched and reported by several committees. For example, the Kefauver Committee investigated the effects of organized crime on interstate commerce. *See Hearings before a Special Comm. to Investigate Organized Crime in Interstate Commerce*, 82d Cong., 2d Sess. (1950-51); S. REP. No. 141, 82d Cong., 1st Sess. (1951). *See generally* WILLIAM H. MOORE, THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME, 1950-1952 (1974). The McClellan Committee studied the structure of organized criminal networks, specifically La Cosa Nostra (the Mafia). *See* S. REP. No. 72, 89th Cong., 1st Sess. (1965). While the OCCA enjoyed wide support from a variety of organizations, *see, e.g.*, ABA REPORT ON ORGANIZED CRIME & LAW ENFORCEMENT 10 (1952-53), several representatives expressed dissenting views on the statute's enactment. *See Dissenting Views of Representative John Conyers, Jr., Representative Abner Mikva, & Representative William Ryan, on the Organized Crime Control Act*, 1970 U.S.C.C.A.N. (91 Stat.) 4076, 4081.

For a more extensive treatment of RICO's legislative history, see *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, on S.30 and Related Proposals*, 91st Cong., 2d Sess. (1970) [hereinafter *House Hearings on S.30*]; MATERIALS ON RICO: CRIMINAL OVERVIEW, CIVIL OVERVIEW, CORNELL INSTITUTE ON ORGANIZED CRIME (Robert Blakey ed., 1980); Blakey & Gettings, *supra* note 6, at 1014-33; G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 249-83 (1982).

Approximately 27 states have adopted "Baby RICO" statutes that are substantively similar to the OCCA. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-2301 to -2316 (1978 & Supp. 1988); CAL. PENAL CODE §§ 27 186-186.6 (West 1988); COLO. REV. STAT. §§ 18-17-101 to -109 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West 1985 & Supp. 1989); DEL. CODE ANN. tit. 11 §§ 1501-1511 (1987); FLA. STAT. ANN. §§ 895.01 to

Organized crime was "big business" and existing criminal laws proved inadequate to counter the resources of the well-endowed "mafia" conglomerates.[18] This research further disclosed that the highly procedural nature of criminal law and the minimal penalties assessed for individual felonies made deterrence of larger organizational activity virtually impossible.[19] OCCA drafters specifically designed RICO to alleviate these problems.

RICO is an innovative statute which removes many of the obstacles to effective organized crime control.[20] It gives prosecutors greater freedom in utilizing various law enforcement measures, and allows them to target organized criminal networks. Substantively, RICO does not proscribe any *new* criminal activity.[21] Its penalties are only triggered when the prosecution proves that a group of indi-

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.09 (West Supp. 1989); GA. CODE ANN. §§ 26-3401 to -3414 (Harrison 1988 & Supp. 1988); HAW. REV. STAT. §§ 842-1 to -12 (1985 & Supp. 1988); ID. CODE § 1651-1660 (Smith-Hurd 1985); LA. REV. STAT. ANN. §§ 15:1351 to :1356 (West Supp. 1989)(limited to narcotics); MINN. STAT. §§ 609.901 to .912 (Supp. 1989); MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1988); NEV. REV. STAT. ANN. §§ 207.350 to .520 (Michie 1986); N.J. STAT. ANN. §§ 2C:41-1 to -46.2 (West 1982 & Supp. 1989); N.M. STAT. ANN. §§ 30-42-1 to -6 (1978 & Supp. 1988); N.Y. PENAL LAW §§ 460.00 to .80 (McKinney Supp. 1988); N.C. GEN. STAT. §§ 75D-1 to -14 (1987 & Supp. 1988); N.D. CENT. CODE §§ 12.1-06 to .1-08 (1985 & Supp. 1989); OHIO REV. CODE ANN. §§ 2923.31 to .36 (Anderson 1987 & Supp. 1988); OKLA. STAT. ANN. tit. 22, §§ 1401-1419 (West Supp. 1989); OR. REV. STAT. §§ 166-715 to -735 (1985 & Supp. 1988); 18 PA. CONS. STAT. ANN. § 911 (1983 & Supp. 1989); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985); TENN. CODE ANN. §§ 39-12-201 to -210 (Supp. 1989); UTAH CODE ANN. §§ 76-10-1601 to -1609 (Supp. 1989); WASH. REV. CODE ANN. §§ 9A.82.001 to .904 (1988 & Supp. 1989); WIS. STAT. ANN. §§ 946-80 to -87 (West Supp. 1987).

18 See *House Hearings on S.30, supra* note 17, at 78, where Senator McCullogh states:

> Organized crime is big government. It is a system unto itself. It lives by its own laws, maintains its own means of law enforcement, demands and gets unsurpassing loyalty. . . . Organized crime is big business . . . . It diminishes the quality of American life. Its corrupting influence permeates small businesses as well as big businesses. It undermines local, State, and Federal Government.

19 *Id.* at 106 (statement of Sen. John L. McClellan):

> This is so because the criminal process has suffered from two major limitations as a means of protecting our economic institutions from this kind of infiltration. The first disability is procedural. Since a criminal conviction subjects a defendant to penalties involving loss of life, liberty, or property, our law quite properly has burdened the government in a criminal case with strict procedural handicaps, placing the government procedurally at a relative disadvantage. This one-sided character of the criminal process has been a handicap in the use of the criminal law as a means of avoiding infiltration of legitimate business by organized crime, just as it has hindered the use of the criminal law to curb other aspects of organized crime.

20 *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987) (RICO was designed to eliminate "all the factors inhibiting [effective] law enforcement response to organized crime, the single most important [being] the procedural and evidentiary difficulty of making cases.").

21 *See* Jeff Atkinson, *Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978).

viduals have engaged in a series of illegal activities *already* punishable under existing state and federal laws.[22] Procedurally, RICO focuses on group activity.[23] It allows law enforcement officials to act against multiple defendants, usually the principals of the criminal network, rather than only one or two individuals. These features, combined with its broad statutory language, make RICO an attractive alternative to existing prosecutorial tools. In addition, RICO's structure allows for a flexible application in a variety of settings.[24]

2. *Structure*

Internally, RICO's tripartite structure defines substantive offenses[25], criminal penalties[26] and civil remedies.[27] RICO substantive offenses prohibit the acquisition, operation, or control of an "enterprise" or business through a "pattern of racketeering."[28] These two elements—the pattern of racketeering and the enterprise—are hallmarks of a RICO violation. Specifically, the enterprise element focuses on the *organized* nature of the criminal activity. The pattern element incorporates various substantive federal and state criminal violations as "predicates" to establishing a RICO offense.[29]

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22 *See infra* notes 32-37 and accompanying text.

23 *See infra* note 32.

24 RICO's statutory provisions permit a flexible application because they are premised on the concept of "enterprise criminality." Enterprise criminality focuses on criminal activity within a business context. It targets a group of people engaged in various illegal activities for the purpose of furthering a legitimate or illicit business. *See* Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET,"* 73 MINN. L. REV. 1023, 1034-35 (1989) ("RICO provides both civil and criminal sanctions against persons engaged in 'enterprise criminality.' Because RICO focuses on enterprises, it strikes at the organizational foundation of systemic crime."); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 775 (1988):

> Concern with enterprise criminality provided the impetus for RICO. Congress recognized that previous efforts against organized crime had failed because the focus had been on individual prosecutions rather than on organizational foundations. Since the structure and strength of organized crime transcend its membership, criminal enterprises could thrive despite successful individual prosecutions;

Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 649 n.12 (1989) ("Enterprise criminality. . .speaks of the commission of crime in the context of an organization, which is as easily a corporation as a Mafia family. . . ."). *See also* United States v. Gonzalez, 921 F.2d 1530 (11th Cir. 1991); Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990).

25 *See supra* note 4.

26 *See supra* note 3.

27 18 U.S.C. § 1964 (1988).

28 *See infra* notes 30-39 and accompanying text for discussion of the enterprise and pattern elements as well as a definition of "racketeering."

29 *See infra* notes 32-37 and accompanying text.

a. *Enterprise Element*

Section 1961(4) defines an enterprise as "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[30] Courts have broadly construed the enterprise element to bring a wide array of organizations within the scope of the Act.[31]

Recently, prosecutors have attempted to stretch the enterprise element of RICO to include a "single person concept."[32] The single person concept stems from a literal interpretation of the definition of an enterprise. It equates the "enterprise" with an individual rather than a group of people working within an organization. This concept is problematic, however, because it allows prosecutors to circumvent the enterprise element and focus solely on an individual's pattern of illicit conduct to prove the RICO violation. By subjecting individual criminals to RICO's enhanced penalty structure, courts reach a result contrary to that envisioned by the Act.

b. *Pattern of Racketeering*

The second requirement for a RICO substantive violation is a "pattern of racketeering activity."[33] This racketeering activity in-

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30 18 U.S.C. § 1961(4) (1988).

31 *See* Tarlow, *supra* note 6, at 169-70:

> RICO violations have been alleged against an astonishing variety of defendants, including members of the Hell's Angels motorcycle club, a factory worker at General Motors, a large Japanese corporation manufacturing electrical cable, magistrates, constables, and employees of the Allegheny County court system, and union leaders accused of junketeering. Most defendants charged with violating RICO could not conceivably be included within the traditional or newly expanded definitions of organized crime. (footnotes omitted).

32 *See* Atkinson, *supra* note 21, at 12-13; Tarlow, *supra* note 6, at 14-15. The "single person" concept of the enterprise element is not widely adopted by the courts. However, there are a few reported opinions accepting the theory. *See, e.g.*, United States v. Marrone, 746 F.2d 957, 958 (3d Cir. 1984) ("An enterprise offense under § 1962(c) may be committed by an individual acting alone . . . ."); United States v. Elliot, 571 F.2d 880, 898 n.18 (5th Cir.) ("The number of persons making up an enterpise is irrelevant, however, in that even a single individual may be considered an 'enterprise' under the statutory definition."), *reh'g denied*, 575 F.2d 300, *cert. denied*, 439 U.S. 953 (1978). *But see* Cullen v. Margiotta, 811 F.2d 698, 729 (2d Cir. 1987) (court stated that a solitary entity cannot simultaneously be RICO "person" and "enterprise"), *cert. denied*, Nassau County Republican Comm., 483 U.S. 1021 (1987); United States v. Feldman, 853 F.2d 648, 656 (9th Cir.) ("To be convicted of a RICO violation, the defendant ' "person" must be separate and distinct entity from the "enterprise" ' (quoting Schreiber Dist. Corp. v. Servwell Furniture Co., 806 F.2d 1393, 1396 (9th Cir. 1986))), *cert. denied*, 489 U.S. 1030 (1989).

For a general discussion of the enterprise element, see David Vitter, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View*, 62 TUL. L. REV. 1419 (1988); O'Neill, *supra* note 24, at 656.

33 Racketeering activity is defined in 18 U.S.C. § 1961(1)(1988) to incorporate eight state offenses: murder, kidnapping, gambling, arson, robbery, bribery, extortion,

cludes both state and federal offenses, which are referred to as "predicates" because the prosecutor must first establish a violation of at least two of the enumerated offenses in order to meet the pattern requirement of the substantive RICO offense.

The pattern requirement is the more controversial aspect of a RICO substantive violation because the language of the Act does not specify what constitutes a "pattern."[34] Section 1961(5) defines pattern of racketeering activity as "at least two acts of racketeering activity, one of which occurred . . . within ten years . . . after the commission of a prior act of racketeering activity."[35] This definition, however, has yielded a variety of interpretations and spawned several legislative attempts to clarify its meaning.[36]

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and dealing in narcotics; and 22 separate federal offenses: bribery, counterfeiting, theft from interstate shipments, embezzlement of pension and welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, obstruction of justice, obstruction of criminal investigations, interference with commerce, racketeering, unlawful welfare payments, white slave traffic, embezzlement of union funds, bankruptcy fraud, fraud in securities, transporting contraband, illegal gambling businesses, dealing in narcotics and dangerous drugs, and interstate transportation of wagering paraphernalia.

34 *See* Edward S.G. Dennis, Jr., *Current RICO Policies and the Department of Justice*, 43 VAND. L. REV. 651, 651-72 (1990) (arguing that, in light of recent Supreme Court decision in H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989), the interpretation of the pattern element still contains ambiguities: "[A]fter *H.J. Inc.*, all we know for certain is that a pattern of racketeering activity need not involve separate schemes . . . [t]he task will be to improve RICO by supplying some clarity to the pattern element." Dennis, *supra* at 667); Michael Goldsmith, *RICO and "Pattern:" The Search for "Continuity Plus Relationship,"* 73 CORNELL L. REV. 971, 989-1003 (1988)("[T]he meaning of pattern is currently the most controversial interpretative issue arising under . . . 'RICO'. . . . The controversy surrounding this element stems from two factors. First, RICO does not define 'pattern of racketeering activity' . . . Second, . . . the judiciary [has] fail[ed] to interpret the pattern element meaningfully."); *see also supra* note 33.

35 18 U.S.C. § 1961(5) (1988).

36 The expansive interpretation of the RICO patteru element has led to several attempts to clarify the provision's language. *See RICO Reform Act of 1989: Hearings Before the Subcomm. on Crime, of Comm. on the Jndiciary, House of Representatives, on H.R. 1046*, 101st Cong., 1st Sess. 939 (1989) (H.R. 1046 was designed to amend the statutory language of RICO. In particular, § 102 of H.R. 1046, entitled "Patteru," expands the current definition and requirements for pattern of racketeering as follows:

> "pattern of racketeering activity" means
>
> (A) three or more acts of racketeering activity . . . ,
>
> (B) the last act of racketeering activity occurred within five years of a prior act of racketeering activity,
>
> (C) the acts of racketeering activity were related to each other or to the affairs of an enterprise,
>
> (D) the acts of racketeering activity were part of a continuing series of acts of racketeering.

Id. See also Proposed RICO Reform Legislation: Hearings Before the Committee on the Judiciary, U.S. Senate, on S. 1523, 100th Cong., 1st Sess. 401 (1987)(S. 1523 proposes renaming the 18 U.S.C. § 1961(5) definition, "pattern of racketeering activity," to "pattern of unlawful activity"); *RICO Reform: Hearings Before the Subcomm. on Criminal Justice, the Comm. on the Judiciary, House of Representatives, on H.R. 2517, H.R. 4892, H.R. 5290, H.R. 5391, and H.R. 5445*, 99th Cong., 1st & 2d Sess. 261 (1986) (statement of John C. Keeney, U.S.

One approach which gained considerable acceptance by the courts focused on the "continuity and interrelatedness" of the racketeering acts to establish the pattern element.[37] This narrowed the application of RICO's pattern element by requiring the court to determine the *relationship* between the individual acts, as well as their continuity. Thus, a pattern of racketeering activity was established only when the racketeering acts were connected and not simply a series of disconnected acts.[38] The pattern element also raises the unresolved issue of whether separate prosecutions for a RICO substantive offense and for a specific predicate offense are permissible in light of double jeopardy prohibitions.[39]

B. Double Jeopardy

The concept of double jeopardy is rooted in the common-law maxim that "no man shall be twice put in jeopardy of life and limb."[40] Historically, this phrase bore particular significance in criminal proceedings where offenses were punishable by death or mutilation.[41] Double jeopardy later came to stand for a defendant's constitutional right to be free from excessive punishment and the burden of multiple criminal proceedings.[42] The United States Constitution incorporates these principles under the Fifth Amendment's

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Dep't of Justice) (H.R. 2517 amends RICO's criminal provisions by redefining key terms such as "enterprise" and "racketeer." Also, H.R. 2517 "substantially change[s] the definition of RICO's central element of 'pattern of racketeering activity.' ").

Commentators have also proposed legislative revision of RICO. *See, e.g.*, G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and Various Proposals for Reform: "Mother of God—Is This the End of RICO?,"* 43 VAND. L. REV. 851, 964 (1990):

> [T]o draft a more concrete definition of "pattern," it is necessary to determine how the word is used in the statute. Any definition of "pattern" must also meet two tests. First, the definition must work in both criminal and civil litigation. Second, it must work in all sections of the statute. Finally, careful attention must be given to the setting in which the word appears in the statute.

37 *See* United States v. Indelicato, 865 F.2d 1370, 1381 (2d Cir.) ("[W]e conclude today that . . . a RICO pattern may not be established without some showing that the racketeering acts are interrelated and that there is continuity or a threat of continuity. . . ."), *cert. denied*, 493 U.S. 811 (1989); United States v. Kaye, 556 F.2d 855, 860-61 (7th Cir.) (defendant engaging in continuous and related activity over four and one-half years established pattern requirement for RICO violation), *cert. denied*, 434 U.S. 921 (1977); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974) ("[T]here is implicit in the statutory definition of 'pattern of racketeering activity' a requirement that the government must prove such an interrelatedness beyond a reasonable doubt in order to obtain a conviction under [RICO].").

38 *See* Tarlow, *supra* note 6, at 214.

39 *See infra* notes 42-86 and accompanying text.

40 *See, e.g.*, Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 69 (1866).

41 *See* JAY A. SIGLER, DOUBLE JEOPARDY 1-37 (1969).

42 *Id.*

Double Jeopardy Clause. In *Green v. United States*,[43] the Supreme Court reiterated the purpose of this Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[44]

Thus, the Double Jeopardy Clause protects against multiple prosecutions after an acquittal or conviction, and against multiple punishments for the same offense.[45] The language of the Clause, however, provided little guidance for double jeopardy analysis and, as a result, early analysis borrowed heavily from historical precepts found in English common law.[46]

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43 355 U.S. 184 (1957). *See* Donald E. Burton, Note, *A Closer Look at the Supreme Court and Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 803 (1988).

44 355 U.S. at 187-88.

45 The Supreme Court recognized that the Double Jeopardy Clause has incorporated these protections in North Carolina v. Pearce, 395 U.S. 711, 717-19 (1969).

46 *See* SIGLER, *supra* note 41, at 21-27. For a comprehensive discussion of the development and history of English jurisprudence, see generally HERMAN COHEN, THE SPIRIT OF OUR LAWS (1967); FREDERIC W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908); EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW (1912).

Double jeopardy analysis originated in the English common-law system of pleas. Under this highly structured practice, courts decided jeopardy claims based on the pleas a defendant entered at trial. Three pleas, *autrefoits acquit*, *autrefoits convict*, and *autrefoits attaint*, were available to the defendant in an action against a second trial. The most common plea used was the *autrefoits acquit*, which barred a second criminal action after acquittal in the first proceeding. Courts only recognized these defenses, however, when the second prosecution was for the identical act and crime. For example, if *A* broke into *B*'s home and stole *B*'s possessions, *A* could be charged with larceny and trespass. Based on the written pleas, these two offenses were distinct at law, even though they arose out of a single act. Therefore, if the jury acquitted *A* for larceny in the first trial, this did not preclude a second prosecution for trespass. Since an individual's unlawful conduct could violate several criminal laws, this rigid plea system only afforded defendant's minimal protection against severe penalties for offenses. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 396-99 (Robert M. Kerr ed., 1962):

> The plea of auterfois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy more than once for the same offence. And hence it is allowed as a consequence, that when a man once fairly found not guilty upon any indictment, or other jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Secondly, the plea of auterfois convict, or a former conviction for the same identical crime, though no judgement was ever given, is a good plea in bar to an indictment.

See also HERBERT BLOOM & EDWARD A. HADLEY, 4 COMMENTARIES ON THE LAWS OF ENGLAND 428-439 (1869); SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 240-254 (1778); and F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (A.H. Clayton & W.J. Whittaker eds., 1962).

1. *The Traditional* Blockburger *"Same Offense" Test*

In *Blockburger v. United States*,[47] the Supreme Court enunciated the "same offense" test as the federal constitutional standard for double jeopardy analysis.[48] In *Blockburger*, the defendant was convicted for a drug sale that violated two separate substantive provisions of the Harrison Narcotics Act.[49] After construing the legislative history of the Harrison Act, the trial court ruled that each provision required imposition of a separate penalty and sentenced Blockburger to five years imprisonment and a $2000 fine for each offense.[50] On appeal, Blockburger argued that the trial court erred when it imposed a cumulative sentence because he was being punished twice for the same conduct.[51]

The *Blockburger* Court rejected this contention and stated that the proper test for double jeopardy analysis required a court to compare the statutory elements of each offense and determine if one required proof of a fact which the other did not. If the necessary facts were identical, then the offenses were actually one and the

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47 284 U.S. 299 (1932).

48 This test replaced its common-law predecessor, the "same evidence" test. Under the same evidence test, the Government is prevented from introducing evidence used in the first trial against a defendant in a subsequent proceeding. For example, suppose a defendant robbed two individuals, *A* and *B*. If the Government prosecuted the defendant in one trial for theft from *A*, this did not preclude a subsequent trial for theft from *B* because the evidence with respect to the things stolen from *A* would not be the same as that for *B*. *See* Ashe v. Swenson, 397 U.S. 436, 452-53, 452 n.4 (1970) (Brennan, J., concurring).

The Supreme Court, in Grady v. Corbin, 110 S. Ct. 2084, 2084 n.12 (1990), noted that several commentators have erroneously equated the *Blockburger* same offense test with the same evidence test. *See, e.g.*, Marcy D. Hirschfeld et al., *Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1987-88; Preliminary Proceedings: Double Jeopardy*, 77 GEO. L.J. 695, 878 n.1834 (1989); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 435 (1986); Karen J. Ciupak, Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 390 (1982).

49 Harrison Narcotics Act, ch. 18, § 1006, 40 Stat. 1057, 1131 (1919). As quoted by the Court, 284 U.S. at 300 n.1, § 1 of the Act stated:

> It is unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package . . . and the absence of appropriate tax-paid stamps . . . shall be prima facie evidence of a violation of this section . . . .

Section 2 of the Act stated:

> It is unlawful for any person to sell, barter, exchange, or give away any of the drugs. . .in pursuance of a written order of the person to whom such article is sold, . . . on a form to be issued in blank for that purpose by the Commissioner of the Internal Revenue.

284 U.S. at 300 n.2.

50 284 U.S. at 301.

51 *Id.*

same.[52] For example, suppose the defendant committed an unlawful act that violated two statutes, *X* and *Y*. If crime *X* consists of elements *A* and *B* but crime *Y* consists of elements *C* and *D*, under *Blockburger* the two offenses would be distinct because *Y* requires different elements of proof from *X*. Conversely, if both statutes contained elements *A*, *B*, *C*, and *D*, then the *Blockburger* test prohibits prosecution because the statutes were technically the same offense. In essence, the inquiry focused on a comparison of statutory elements, rather than the defendant's conduct, to determine whether separate prosecutions were constitutionally permissible.[53]

In *Blockburger*, after analyzing the Harrison Narcotics Act, the Supreme Court concluded that the two provisions were distinct because one required proof of a valid, tax-stamped package, while the other required a written order from the Commissioner of the Internal Revenue.[54] Affirming Blockburger's conviction, the Court stated that "[t]he plain meaning of the provision[s] is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction."[55]

Blockburger provided the applicable standard for double jeopardy analysis in the context of cumulative punishment.[56] Courts were permitted to impose additional penalties only if the offenses *first* satisfied the *Blockburger* test of distinct statutory elements, and only if the legislature clearly mandated separate penalties for each offense. However, the *Blockburger* test afforded little protection against successive prosecutions. An innovative prosecutor could easily meet the *Blockburger* standard by separating the charges arising out of the defendant's conduct into separate proceedings, thereby securing a more stringent sentence.[57] Even if the defendant

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52 *Id.* at 304.

53 *Cf.* Iannelli v. United States, 420 U.S. 770, 785 (1975).

54 284 U.S. at 302-04.

55 *Id.* at 305.

56 Cumulative punishment occurs when the court imposes separate penalties for separate offenses even though they arise out of the same criminal transaction. For cases analyzing double jeopardy, see Jones v. Thomas, 491 U.S. 376, *reh'g denied*, 492 U.S. 932 (1989); Ball v. United States, 470 U.S. 856 (1985); United States v. Woodward, 469 U.S. 105 (1985); United States v. Fontanez, 869 F.2d 180 (2d Cir. 1989); United States v. Anderson, 851 F.2d 384 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1012 (1989); United States v. Rodriguez, 858 F.2d 809 (1st Cir. 1988).

57 Issues concerning multiplicity and duplicity, however, could possibly bar this choice of action. Duplicity is when two of more distinct and separate offenses are joined in a single count. Multiplicity occurs when the State charges a single offense in several counts. CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 142 (1982).

For cases defining duplicity, see United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988); United States v. Shorter, 809 F.2d 54, 56 (D.C. Cir.), *cert. denied*, 484 U.S. 817

secured an acquittal on one charge in an initial trial, *Blockburger* allowed the prosecution to "refine its presentation" on alternative charges and improve the probability of conviction in a second proceeding.[58]

To remedy this problem, the Supreme Court made two significant modifications to double jeopardy analysis. First, it extended the scope of the Double Jeopardy Clause by incorporating the doctrine of collateral estoppel. Second, the Court narrowed the scope of Blockburger's precedent by creating exceptions to the same offense test.

2. *The Doctrine of Collateral Estoppel* (Blockburger-Ashe)

The Supreme Court first modified *Blockburger* in *Ashe v. Swenson*,[59] holding that the Double Jeopardy Clause embodied the doctrine of collateral estoppel.[60] Collateral estoppel prohibits relitigation of any and all factual issues fully adjudicated in a prior proceeding. This new *Blockburger-Ashe* standard is significant because it not only pushes double jeopardy analysis beyond the threshold of the same offense test, but also provides defendants with additional protection against multiple prosecutions.

(1987); United States v. Aguilar, 756 F.2d 1418 (9th Cir. 1985); United States v. Hawkes, 753 F.2d 355 (4th Cir. 1985); United States v. Lyons, 703 F.2d 815, 821 (5th Cir. 1983).

For cases defining multiplicity, see United States v. Kazenbach, 824 F.2d 649 (8th Cir. 1987); United States v. Beechnut Nutrition Corp., 659 F.Supp 1487 (E.D.N.Y. 1987), *aff'd*, 871 F.2d 1181, *cert. denied*, Lavery v. United States, 493 U.S. 933 (1989); United States v. Sadlier, 649 F. Supp. 1560 (D. Mass. 1986).

58 See 397 U.S. at 447, in which the State conceded that after the defendant was acquitted in one trial, the prosecutor did, at a subsequent trial, "what every good attorney would do—he refined his presentation in light of the turn of events at the first trial."

59 *Id.* at 436.

60 The RESTATEMENT (SECOND) OF JUDGMENTS § 27 states that under collateral estoppel (issue preclusion), "when an issue of fact or law is actually litigated and determined by a valid and final judgement, and the determination is essential to the judgement, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *But see* Iannelli v. United States, 420 U.S. 456 (1982) (substantial overlap of proof no bar to second prosecution) and Diaz v. United States, 223 U.S. 442 (1912) (exception exists when the State is unable to proceed because additional facts necessary to sustain the charge have not occurred or have not been discovered). *See also* Anne B. Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CINN. L. REV. 1 (1989); Burton, *supra* note 43, at 813:

> [T]he Double Jeopardy Clause is an absolute bar to retrial after acquittal (an acquittal is "a resolution, correct or not, of some or all of the factual elements of the offense charged"). "[A] verdict of acquittal is final, ending a defendant's jeopardy." The clause is also an absolute bar to further proceedings even if an acquittal is based on an erroneous interpretation of law; an appellate court cannot reverse a judge's acquittal even if the judge based the acquittal "upon an egregiously erroneous foundation." (footnotes omitted).

In *Ashe*, the defendant was charged with participating in a gang robbery of a six-man poker game.[61] The central issue at trial was the identity of the robbers. The jury acquitted the defendant of all charges due to insufficient evidence. The State then prosecuted Ashe a second time, charging him with theft from a *different* player involved in the same poker game.[62] The Court held that the application of collateral estoppel barred the subsequent prosecution because the first trial had already adjudicated the "essential element" of the second proceeding, the identity of Ashe as one of the robbers.[63]

The *Blockburger-Ashe* standard modified double jeopardy analysis by requiring courts to perform a two-step process when deciding double jeopardy claims. A court first must apply the traditional *Blockburger* test, comparing statutory elements of the offenses charged in both proceedings. If the elements are not identical, then the court must review the substantive and procedural issues adjudicated in the first trial.[64] If the "essential elements" of the second

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61 397 U.S. at 437-38.

62 *Id.* at 446.

63 *Id.* at 439-42. The Supreme Court also reversed the conviction, because the jury in the first trial, by its verdict that petitioner was not one of the robbers, constitutionally foreclosed the State from relitigating that issue in another trial. *Id.* at 446.

Justice Brennan, writing a concurring opinion, agreed with the majority's position but stated that the constitutional guarantee under the Double Jeopardy Clause extends beyond the mere prohibitions of the doctrine of collateral estoppel. Citing the inadequacies of early double jeopardy analysis and changes in modern criminal procedure, *Id.* at 451-54, Brennan argued that the judicial standard should be a "same transaction" test, which requires prosecutors to join all charges arising out of a single act in one proceeding. In his view, this test was ideal because it

> not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.

Id. at 454. *See also infra* note 151.

Brennan also referred to the origins of double jeopardy in English common law. He referred to the "same evidence" test which "prevents the government from introducing in a subsequent prosecution any evidence that was introduced in a preceding prosecution." Grady v. Corbin, 110 S. Ct. 2084, 2093 (1990). This standard has been rejected by the Court because it created anomalous results, especially in multiple prosecutions.

> The 'same evidence' [test] deficiencies are obvious. It does not enforce but virtually annuls the constitutional guarantee . . . . Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. . .the potentialities for abuse inherent in the 'same evidence' test are simply intolerable.

Id. at 451-52.

64 Specifically, the court must review the "prior proceedings taking into account the pleadings, evidence, charge, and other relevant matter, [to] conclude whether a rational

offense were adjudicated in the first trial, the prosecution is barred. For example, Ashe, in the first trial, was charged and acquitted of robbing poker player Knight.[65] In the second proceeding, the State charged Ashe with theft from poker player Roberts.[66] The offenses were distinct under *Blockburger* analysis because the victims were different. However, after assessing the facts and evidence in the first trial, the Court determined that the substantive issue of the second prosecution, the identity of Ashe as one of the robbers, had already been adjudicated.[67] The *Blockburger-Ashe* standard, therefore, provided defendants with additional double jeopardy protection, especially in the context of multiple proceedings.

3. *Greater and Lesser-Included Offenses* (Blockburger-Brown)

The Supreme Court modified double jeopardy analysis again in *Brown v. Ohio*[68] by extending *Blockburger* to incorporate the standard of greater and lesser-included offenses. In *Brown*, the defendant stole a car and drove it for nine days, violating two Ohio statutory provisions—joyriding and auto theft.[69] The Ohio statute defined joyriding as "[unlawfully] taking or operating a car without the owner's consent."[70] Auto theft, however, required only an additional element of intent to deprive the owner of permanent possession.[71] The Court concluded that "joyriding" constituted a lesser-included offense because it "require[d] no proof beyond that which [was] required for conviction of the greater [offense]—auto theft."[72]

A lesser-included offense exists when all of the elements necessary for its proof also constitute the elements necessary to establish another, greater offense. In essence, conduct that violates the

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jury could have founded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (quoting Sealfon v. United States, 332 U.S. 575, 579 (1948).

65 *Id.* at 438.

66 *Id.* at 439.

67 *Id.* at 446.

68 432 U.S. 161 (1977). The Supreme Court reaffirmed the *Brown* holding in Harris v. Oklahoma, 433 U.S. 682 (1977) (per curiam), which presented the converse situation of a prosecution for the lesser-included offense after a prior conviction on the greater offense. "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Id.* at 682. See also *infra* notes 125-26 and accompanying text for a discussion of Justice Scalia's view on *Harris* and its effect on double jeopardy analysis. Justice Brennan also concurred in *Harris*, reiterating his position that the Court should adopt a "same transaction" approach for double jeopardy analysis. 433 U.S. at 683.

69 432 U.S. at 162-63.

70 *Id.*

71 *Id.* at 163.

72 *Id.* at 168.

greater offense automatically establishes proof of the lesser. For example, suppose crime *X* requires proof of elements *A*, *B*, *C*, and crime *Y* requires proof of *A*, *B*, *C*, *D*, and *E*. A comparison of the statutes reveals that the elements of *Y* necessarily include all of the elements of *X* and proof of a *Y* violation automatically establishes proof of *X*. Under the new *Blockburger-Brown* standard, *X* becomes a lesser-included offense. Thus, failure to prove *X* (the lesser-included offense) in the first trial bars a later prosecution for *Y* (the greater offense) because the statutes are treated as creating the same offense.[73]

This revised double jeopardy standard, therefore, increases the protection available to defendants by requiring a more thorough analysis of the statutory elements of offenses charged in both proceedings. In addition, this modification adds a third tier to double jeopardy analysis. First, the court compares the statutory elements of the relevant offenses (*Blockburger*); second, the court determines if the elements of one offense entirely incorporate those of the other (*Blockburger-Brown*); and third, the court performs a retrospective review of the prior proceedings (*Blockburger-Ashe*).

4. Blockburger *Converted from a Constitutional Standard to a Statutory Rule of Construction*—Whalen v. United States[74]

The decisions in *Brown* and *Ashe* increased the protection from multiple prosecutions provided by the *Blockburger* same offense test. By applying the doctrine of collateral estoppel and prohibiting multiple prosecution for both greater and lesser-included offenses, these decisions increased the double jeopardy protection available to defendants. In *Whalen v. United States*,[75] however, the Supreme Court significantly altered double jeopardy analysis by converting *Blockburger* from a constitutional standard to a statutory rule of construction—a change which raises new issues regarding the protection available under the Double Jeopardy Clause.

In *Blockburger*, the Court held that the two provisions of the Harrison Narcotics Act were distinct under its newly enunciated same offense test, because one required proof of an additional fact which the other did not.[76] After the *Blockburger* test was satisfied, the

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73 Even if crime *X* had additional elements, such as *F* and *G*, that made it distinct from crime *Y* for purposes of the *Blockburger* and *Blockburger-Brown* standards, the court must still review the prior proceedings under the *Blockburger-Ashe* standard to determine if collateral estoppel bars the second prosecution.

74 445 U.S. 684 (1980).

75 *Id.*

76 Blockburger v. United States, 284 U.S. 299 (1932). *See also supra* notes 47-58 and accompanying text.

Court imposed an additional sentence against the defendant, finding that Congress had specifically provided separate penalties for each provision.[77] The difficulty, however, with the Court's decision in *Blockburger* is that it fails to determine whether a similar result would be reached if the converse situation occurred.[78] For example, if a defendant violated crimes *X* and *Y*, both of which required proof of elements *A*, *B*, and *C*, would the Double Jeopardy Clause still bar the imposition of *cumulative* punishment despite clear legislative intent to the contrary? The Court did not resolve the question of whether *Blockburger* mandated this result until *Whalen v. United States.*[79]

In *Whalen*, the defendant was convicted on two charges—rape and felony murder.[80] Under District of Columbia law, to establish felony murder the State had to prove that the defendant violated one of six enumerated felonies, which included rape.[81] The trial court sentenced Whalen to two consecutive terms of imprisonment, twenty years to life for first degree murder and fifteen years to life for rape.[82] On appeal, Whalen argued that the trial court erred in imposing consecutive sentences because felony murder included rape as a lesser-included offense and current *Blockburger* analysis compelled a finding that this inclusion resulted in the same offense.[83] The court of appeals, however, rejected this assertion, and the issue raised before the Supreme Court was whether the constitutional prohibition against double jeopardy permitted separate punishment for two offenses considered the same under *Blockburger*.[84]

The Court stated that the proper disposition of this issue depended on congressional intent and referred to *Blockburger* as the appropriate "rule for statutory construction."[85]

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77 *Id.*

78 *But cf.* Garrett v. United States, 471 U.S. 773, 779 (1985) (finding in a RICO decision that the "[B]lockburger rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history.") *See also infra* notes 155-88 and accompanying text for discussion of double jeopardy analysis in the RICO context.

79 445 U.S. 684 (1980).

80 *Id.* at 685.

81 *Id.* at 686. The District of Columbia had a special statutory offense under the first degree murder rule. The felony murder offense in this case was incorporated under this law. D.C. CODE § 22-2401 (1973).

82 445 U.S. at 685.

83 *Id.* at 684.

84 *Id.*

85 For decisions accepting the *Whalen* position on *Blockburger*, see Garrett v. United States, 471 U.S. 773 (1985); Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, 450 U.S. 333 (1981). *See also* Jennifer Hoagland, *Double Jeopardy and Pennsylvania's Merger Doctrine*, 62 TEMP. L. REV. 663 (1989)(discusses double jeopardy and legislative history); George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U. L. REV. 1368-86 (1984) (discusses the limitations of *Blockburger* as a constitutional test and proposes a conduct-based test).

> [T]his Court [has] consistently relied on [Blockburger] to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively. . . . Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."[86]

Applying the *Blockburger* rule in *Whalen*, the Court reversed Whalen's conviction stating that Congress had not specifically authorized consecutive sentences for the greater and lesser-included offenses of felony murder and rape.[87]

By converting *Blockburger* to a statutory rule, the Court permitted cumulative punishment when Congress manifested a clear intent regardless of whether the offenses were the same or distinct. *Whalen*, therefore, nullifies *Blockburger* in the context of cumulative punishment when there is clear legislative intent. In addition, by interpreting *Blockburger* as a statutory rule, the Court reopened the question of which constitutional standard courts should apply to the Double Jeopardy Clause. In *Illinois v. Vitale*,[88] the Supreme Court addressed this issue by reassessing the nature of constitutional protection against double jeopardy.

5. Illinois v. Vitale: *The Road to Grady*

Prior to *Whalen*, the Supreme Court had made fairly consistent changes to double jeopardy analysis in order to effectuate the purposes of the Double Jeopardy Clause. By creating additional steps in judicial analysis of jeopardy claims, the Court assured defendants *greater* protection against excessive punishment and multiple prosecutions than they had previously received under the traditional *Blockburger* same offense test. With *Blockburger* transformed into a statutory rule, however, the Court had to reassess the nature of constitutional protection under the Double Jeopardy Clause and determine the extent to which congressional intent would affect this protection. In *Vitale*, the Supreme Court re-evaluated the status of double jeopardy protection in multiple prosecutions and gave the first clear indication of its intent to modify double jeopardy analysis from an offense-oriented rule to a conduct-based test.[89]

In *Vitale*, the defendant struck and killed two children in an automobile accident.[90] A police officer issued a traffic citation that

86 445 U.S. 684, 691 (1980).
87 *Id.* at 695.
88 447 U.S. 410 (1980).
89 *Id.*
90 *Id.* at 411.

charged Vitale with "failing to reduce speed to avoid an accident."[91] At the first trial, Vitale was convicted and sentenced to pay a nominal fine.[92] In a subsequent proceeding, the State charged Vitale with involuntary manslaughter and Vitale responded with a motion to dismiss on double jeopardy grounds.[93] On appeal to the Supreme Court, the sole issue was whether "failing to reduce speed" created the same offense for double jeopardy purposes as involuntary manslaughter.[94]

The difficulty with this issue rests in the Illinois legislature's failure to clarify whether "failing to reduce speed" was a necessary element for establishing involuntary manslaughter.[95] This case raised an important question under the *Blockburger* standard for double jeopardy analysis, because the Court not only had to compare statutory elements, but also had to review the prior proceedings to determine if the second trial would require relitigating an essential element of the first trial. In light of this standard, the Supreme Court stated that if "failing to reduce speed" constituted a necessary element of involuntary manslaughter, then it became a lesser-included offense which barred a subsequent prosecution.[96] However, if the State could prove involuntary manslaughter without relying on "failing to reduce speed" as the reckless act, state law created two distinct offenses and the second trial could proceed.[97] The Supreme Court remanded the case for clarification of the relationship between the two offenses.[98]

Justice White, who authored the majority opinion, made a significant point in dicta suggesting that, even if the two offenses were distinct under *Blockburger-Brown*, the defendant would still have a

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91 *Id.*

92 *Id.* at 412. Vitale was required to pay a $15 fine.

93 *Id.* at 413.

94 *Id.* at 415-16.

95 *Id.* at 416-19.

96 *Id.* at 421.

97 *Id.*

98 Justice Stevens, joined by Justices Brennan and Stewart, and Justice Marshall in a separate dissenting opinion, disagreed with the majority's decision to remand, stating that regardless of whether "failing to reduce speed" was a necessary element of proof, the Double Jeopardy Clause still barred prosecution. *Id.* at 423. Justice Stevens also disagreed with Justice White's dicta stating,

> [E]ven if the Illinois Supreme Court should hold on remand that failure to reduce speed is not always a lesser-included offense as a matter of state law, respondent will still have a "substantial" double jeopardy claim if the State finds it necessary to rely on his failure to reduce speed in order to sustain its manslaughter case. In my opinion such a claim would not merely be "substantial"; it would be dispositive.

Id. at 426. (Stevens, J., dissenting).

It is also interesting to note that three of these four Justices joined in the majority opinion in Grady v. Corbin, 110 S. Ct. 2084 (1990).

"substantial double jeopardy claim" if the State sought to rely on defendant's *conduct* to prove any element of the alleged offense—conduct for which Vitale had already been prosecuted.[99] This statement implies that, regardless of whether the Illinois legislature intended to create separate offenses, the Double Jeopardy Clause might still bar a subsequent prosecution. The statement indicated the Court's willingness to strengthen double jeopardy protection by insuring that these constitutional gnarantees took precedence over state interest in law enforcement.[100] In *Grady v. Corbin*,[101] the Supreme Court adopted Justice White's *Vitale* dicta and established a new "conduct" test for double jeopardy analysis which affords defendants maximum double jeopardy protection in the context of multiple prosecutions.

II

GRADY V. CORBIN

The recent Supreme Court decision in *Grady* represents a significant transformation of double jeopardy analysis.[102] In *Grady*, the Court abandoned the offense-oriented approach of the traditional *Blockburger* test and established a new conduct-based test designed to insure that the constitutional guarantees of the Double Jeopardy Clause take precedence over state interests in criminal enforcement.

A. Facts

In 1987, the defendant Thomas Corbin, while intoxicated, drove his car across a highway median strip and collided with two

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99 447 U.S. at 421.

100 Thomas, *supra* note 85, at 1394 n.183, comments on the significance of the *Vitale* decision: "[A] fair inference is that a majority of the Court is willing to accept the proposition, first clearly announced in *Brown*, that an additional protection is available to a defendant who faces a second prosecution for the same conduct."

101 110 S. Ct. 2084 (1990).

102 For a general discussion of *Grady* and its effect on the Double Jeopardy Clause, see Edward A. Mallett & Alexander Bunin, *Criminal Law*, 45 Sw. L.J. 253 (1991); George C. Thomas, III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195 (1985); Robert N. Udashen, *Criminal Procedure: Pretrial*, 45 Sw. L.J. 279 (1991); James M. Herrick, Note, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in* Grady v. Corbin, 79 KY. L.J. 847 (1991); Craig J. Wehre, Note, Grady v. Corbin: *Successive Prosecutions Must Survive Heightened Double Jeopardy Protection*, 36 LOY. L. REV. 1171, 1185 (1991); Sara Barton, Comment, Grady v. Corbin: *An Unsuccessful Effort to Define "Same Offense,"* 25 GA. L. REV. 143 (1990); *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 129, 148-58 (1990). *See also* Purcell v. United States, 594 A.2d 527, 529 (D.C. App. 1991), a case factually similar to *Grady*, in which the court held that a hearing before the Bureau of Traffic Adjudication which imposed *civil* penalties did not preclude a criminal prosecution for negligent homicide. "The Double Jeopardy Clause only prohibits successive *criminal* prosecutions or punishments for the same act. It does not bar a criminal prosecution after a proceeding that results in a civil sanction; or vice versa." *Id.* (citations omitted).

oncoming vehicles.[103] Two passengers in one of these vehicles, Daniel and Brenda Dirago, were severely injured in the accident and, later that evening, Brenda Dirago died from the injuries sustained.[104] The police served Thomas Corbin with two misdemeanor traffic citations, one for driving while intoxicated and the other for failure to keep right of the median.[105]

Corbin pleaded guilty to both traffic tickets and the court accepted his plea unaware that a fatality stemmed from the accident.[106] The court imposed the minimum sentence for both offenses: a $350 fine, a $10 surcharge and a six month license revocation.[107] Two months later, a grand jury indicted Corbin for "reckless manslaughter, second-degree vehicular manslaughter, and criminally negligent homicide."[108] The State intended to prove the homicide and assault charges by relying on three reckless acts: (1) driving while intoxicated, (2) failing to keep right of the median, and (3) driving at an unreasonable speed in inclement weather.[109] Corbin moved to dismiss the indictment on double jeopardy grounds.[110]

The trial court denied this motion, and subsequently Corbin sought a writ of prohibition barring prosecution on all counts.[111] The Appellate Division denied the writ but the New York Court of Appeals reversed, stating *inter alia* that prosecution of the manslaughter charges violated "the Double Jeopardy Clause of the Fifth Amendment pursuant to the *Blockburger* test because, as a matter of state law, driving while intoxicated 'is unquestionably a lesser included offense of second degree vehicular manslaughter.' "[112] The court of appeals also relied on the "pointed dictum" in *Vitale* and held that the Double Jeopardy Clause would also bar subsequent prosecution because the State had " 'an intention to rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges.' "[113] The Supreme Court granted certiorari to decide the applicable standard for double jeopardy.[114]

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103 110 S. Ct. at 2087.
104 *Id.* at 2088.
105 *Id.*
106 *Id.* at 2088-89.
107 *Id.* at 2089.
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*

B. The New "Conduct" Test—Majority Opinion

The Supreme Court, affirming the New York Court of Appeals decision, enunciated a new standard for double jeopardy analysis: the "conduct" test, which adopted Justice White's dicta in the *Vitale* decision.[115] This conduct test culminated the Court's efforts to assure defendants maximum protection against successive prosecutions and unwarranted cumulative punishment under the Double Jeopardy Clause.

In *Grady*, the majority held that the Double Jeopardy Clause "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove *conduct* that constitutes an offense for which the defendant has already been prosecuted."[116] This test requires assessment of the State's position to determine exactly what conduct it intends to prove in the subsequent proceeding. Justice Brennan,[117] who authored the majority opinion, first addressed the State's contention that the traditional *Blockburger* test was the *exclusive* standard for double jeopardy analysis.[118] Brennan rejected this assertion in two respects.

First, Brennan argued that precedents, such as *Brown* and *Ashe*, required that inquiry extend beyond the *Blockburger* threshold.[119] The doctrine of collateral estoppel and the standard of greater and lesser-included offenses required courts to delve further into the merits of the second proceeding to decide a defendant's double jeopardy claim. Brennan stated that these decisions and the fact that *Blockburger* is now simply a statutory rule, reflected the Court's intent to make the same offense test only one of several standards for double jeopardy analysis.[120]

Second, Brennan argued that the problems which arose from applying a strict *Blockburger* test to multiple prosecutions influenced the Court to avoid exclusive reliance on this test.[121] A literal application of *Blockburger* may lead to harsher sentences and permits prosecutors to rehearse presentation of proof and to burden the de-

115 *Id.* at 2093.

116 *Id.* (emphasis added) (footnote omitted).

117 Justice White, Justice Marshall, Justice Blackmun, and Justice Stevens all joined the opinion.

118 110 S. Ct. at 2091 n.8 (The majority rejected Scalia's interpretation and support for the idea that *Blockburger* established the exclusive rule for Double Jeopardy analysis.).

119 *Id.* at 2092.

120 *Id.*

121 *Id.*

fendant with several proceedings[122]—a result that is contrary to the purposes of the Double Jeopardy Clause.[123]

The new conduct test applied to the issues in *Grady* simplified the disposition of Corbin's double jeopardy claim. The prosecution intended to rely on *all* of the elements of Grady's conduct which led to the first conviction—namely, "failing to keep right of the median" and "driving while intoxicated"—as part of the proof of the manslaughter charges in the second proceeding.[124]

The majority's creation of the new "conduct" test provoked a strong dissent by Justice Scalia.[125] Scalia viewed the Court's decision as a derogation not only of the Double Jeopardy Clause's interpretative history, but also of the "recognized exclusivity" of the traditional *Blockburger* test.[126] The thrust of his elaborate opinion implied that the Court intentionally adopted an ambiguous and indefensible standard in order to camouflage Justice Brennan's implementation of the "same transaction" approach in a criminal prosecution, an approach which Scalia contended had been consistently rejected by the Court.[127] Scalia's primary criticisms focused on what he termed the "practical effects" of the Court's innovation on future double jeopardy analysis.[128]

C. The "Practical Effects" of the *Grady* Conduct Test—Justice Scalia's Dissent

The majority's conduct test, in Scalia's opinion, represented a deviation from "long standing precedent"[129] and "200 years of established double jeopardy jurisprudence."[130] He viewed this expansion as unwarranted and objected to it for several reasons.

Initially, Scalia argued that under a literal reading of the Double Jeopardy Clause, the defendant only has the right not to be tried for the same *offense*.[131] With a brief definitional reference to the meaning of the word "offense," Scalia concluded that this term does not

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122 *Id.* at 2086.
123 *Id.* at 2091-92.
124 *Id.* at 2094.
125 Justice Scalia was joined in the opinion by Chief Justice Rehnquist and Justice Kennedy.

Justice O'Connor wrote a separate dissent arguing that the majority's decision "stray[s] from a proper interpretation of the scope of the Double Jeopardy Clause. . . The Court's ruling today effectively renders our holding in *Dowling* a nullity in many circumstances." *Id.* at 2095 (O'Connor, J., dissenting).
126 *Id.* at 2097 (Scalia, J., dissenting).
127 *Id.* at 2104.
128 *Id.* at 2096.
129 *Id.* at 2101.
130 *Id.* at 2105.
131 *Id.* at 2096.

incorporate a defendant's acts or conduct.[132] After an extensive review of English common-law and American judicial precepts,[133] Scalia also contended that the concept of judicial double jeopardy analysis is not novel. He stated that the *Blockburger* "same offense" test enunciated in 1932 "reflected a venerable understanding" of the purposes of the Double Jeopardy Clause, and that the Court had designed the test to provide a simple judicial standard for double jeopardy analysis.[134]

Scalia regarded the *Blockburger* test as the exclusive standard for double jeopardy analysis. He cited only two cases in which the Court relaxed the exclusive focus of the *Blockburger* standard: *Ashe*, which incorporated the doctrine of collateral estoppel into the scope of the Double Jeopardy Clause, and *Harris*, which extended *Blockburger* analysis to include the standard of greater and lesser-included offenses.[135] *Ashe* barred a second prosecution in situations which would require the State to relitigate factual issues that had already been resolved in the defendant's favor. *Harris* barred a second prosecution if the statutory elements of one offense were wholly incorporated in another.[136] Scalia considered these situations the only recognized judicial extensions of double jeopardy analysis.

Scalia also criticized the majority for relying on the *Vitale* dicta as the foundation of the "conduct" test. He argned that Justice White's opinion never explicitly stated that a second prosecution *would* be barred should the State use the same conduct to prove a second offense.[137] Justice White's opinion only suggested that the defendant would have a "substantial" jeopardy claim. This statement, however, was never clarified by the Court's holding.[138]

Scalia concluded that in light of these historical and judicial precedents, a proper analysis of the charges under the traditional *Blockburger* test would conclusively resolve whether the State unconstitutionally subjected Corbin to a second trial on the same offense.[139] In the first trial, Corbin was convicted for driving while intoxicated and failing to remain on the right side of the median.[140] In the second proceeding, the State charged him with reckless man-

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132 *Id.* at 2097.

133 *Id.* at 2097-2101.

134 *Id.* at 2100-2101.

135 *Id.* at 2097.

136 *Id.*

137 *Id.* at 2101. In addition, Scalia stated that with the issue now squarely before the Court, it should decline to adopt a conduct-based test to bar such successive prosecutions.

138 *Id.*

139 *Id.*

140 *Id.* at 2088.

slaughter, second-degree vehicular manslaughter, and criminally negligent homicide.[141] These three offenses required proof of elements which the two charges in the first trial did not.[142] Therefore, Scalia argued, under the "correct" *Blockburger* standard, the Double Jeopardy Clause would not bar a second prosecution.[143]

Scalia noted that one of the difficulties with the *Grady* decision is that it is inconsistent with the Supreme Court's earlier decision in *Dowling v. United States*.[144] In *Dowling*, the State used a witness's testimony from a prior robbery trial, which had resulted in acquittal, to prove the defendant's participation in a second robbery.[145] The Court held that collateral estoppel does not "bar later use of evidence relating to prior conduct."[146] Scalia argued that this decision should have "foreclosed" the result reached by the majority in *Grady* because *Dowling* permitted a subsequent prosecution based on evidence of the defendant's conduct used in the first proceeding.[147]

Scalia also rejected what he termed the majority's "inadequate limitations" on the breadth of the *Grady* conduct test. The first limitation provides that the conduct test only applies when the prosecution seeks to establish an essential element of an offense charged in the second prosecution. Scalia summarily dismissed this limitation as meaningless because *all* evidence pertaining to guilt seeks to establish an essential element of the offense.[148] The *Dowling* case aptly illustrated this point because in both trials the central issue was the defendant's identity as a robber, and to successfully litigate this fact, the State only introduced evidence pertaining to his identity, an essential element of the robbery charge.[149]

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141 *Id.* at 2089.

142 *Id.* at 2105.

143 *Id.*

144 *Id.* at 2102. *See* Dowling v. United States, 493 U.S. 342 (1990). In *Dowling*, the defendant was convicted for a bank robbery based on evidence from a prior proceeding.

In the first trial, the Government charged Dowling with attempted buglary and assault in connection with an alleged robbery that occurred at the home of Mrs. Vena Henry. *Id.* at 344. Mrs. Henry testified that she could identify Dowling because his mask came off during the incident. The trial court, however, acquitted Dowling on all charges in connection with the incident.

In a subsequent trial, the Government introduced Mrs. Henry's testimony into evidence to strengthen its case against Dowling for the bank robbery. *Id.* at 344-45. The Court permitted the evidence and instrncted the jury about Dowling's acquittal and the limited purpose for which the testimony was being admitted. *Id.* at 346. Dowling raised the defense of double jeopardy based on the prior acquittal.

145 *Id.* at 344-45.

146 *Id.* at 350.

147 *Id.*

148 110 S. Ct. at 2103.

149 See discussion of *Dowling supra* note 145.

The second limitation requires that evidence introduced in the second prosecution prove conduct that constitutes an offence for which the defendant has already been prosecuted. Scalia acknowledged that this limitation has some merit, but argued that it still creates potentially anomalous results.[150]

First, Scalia argued that if the prosecution intended to use *all* of the facts establishing the crime in the first proceeding, then the new conduct test compels the State to adopt a same transaction approach to criminal prosecution—a position which Justice Brennan had consistently advocated throughout the Court's various decisions on the scope of double jeopardy analysis.[151] The same transaction approach requires the State to bring *all* possible criminal charges arising out of a single occurrence or act in one proceeding. For example, suppose a defendant robbed a convenience store and, while fleeing the scene, dropped a valuable watch stolen two days earlier from a jewelry store in the same neighborhood. The conduct test compels the State to combine both charges of robbery in one trial, because a conviction on either offense in an earlier trial would prohibit the State from raising the other offense in a subsequent proceeding.

Scalia pointed out that if prosecutors use only a *minimal* amount of the alleged conduct, insufficient to establish an offense, then the *Grady* test would permit successive prosecutions.[152] Returning to the hypothetical, suppose the defendant had also assaulted a customer during the robbery. A second trial on the assault charge could proceed, even if the State introduced evidence of the prior robbery, because proof of an assault charge is not enough to establish theft. Scalia argued that the burden on the individual to defend against all the charges arising out of this incident will still exist regardless of whether the State brings the charges in a single or multiple proceedings.

Finally, Scalia empathized with the lower court judges, defense attorneys, and prosecutors, who will have to "decipher" the nebulous terms of the *Grady* "conduct" test to find the appropriate limitations and criterion for application of the standard.[153] Scalia stated

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150 110 S.Ct. at 2103 (Scalia, J., dissenting).

151 *See, e.g.*, Robinson v. Neil, 409 U.S. 505, 511 (1973) (Brennan, J., dissenting) ("I adhere to my view that . . . the Double Jeopardy Clause . . . requires the prosecution, except in most limited circumstances not present here, 'to join at one trial all charges against a defendant that grow out of a single criminal act, occurence, episode or transaction.' " (quoting Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring))). *See also* Grubb v. Oklahoma, 409 U.S. 1017, 1017 (1973) (Brennan, J., dissenting) (same).

152 110 S. Ct. at 2104 (Scalia, J., dissenting).

153 *Id.*

that this decision was really designed to "fully embrace [] Justice BRENNAN's 'same transaction' theory," and he warned prosecutors "confronted with the inscrutability of today's opinion . . . [to] be well advised to proceed on the assumption that the 'same transaction' theory has already been adopted."[154]

III
DOUBLE JEOPARDY IN A RICO CONTEXT: IS *GRADY* A HELP OR A HINDRANCE?

The new conduct test reflects a more restrictive measure designed to limit prosecutorial freedom and to ensure defendants double jeopardy protection against unwarranted punishments and successive prosecutions. Despite the apparent benefits of this decision to defendants, extending the *Grady* conduct test into the RICO context produces potentially anomalous results.

A. Early Double Jeopardy Analysis in RICO Prosecutions

RICO implicates double jeopardy issues precisely because of the compound nature of the statute. In order to show a "pattern of racketeering activity" under RICO, the Government must establish the existence of at least two predicate violations. Most RICO prosecutions have involved multiple proceedings because the RICO substantive offenses are often separated from the underlying predicates. As a result, double jeopardy claims usually arise when the Government, after pursuing a judgment on the substantive RICO offense, attempts to secure a conviction on the predicates, or vice versa.[155]

Under the traditional *Blockburger* same offense test, RICO substantive offenses are easily separated from their predicates because a RICO violation requires the additional elements of a "pattern of racketeering activity" and an "enterprise."[156] Strict *Blockburger* analysis, therefore, treats the RICO substantive offense as distinct from its predicates, and as a result the constitutional prohibition against imposition of cumulative punishment is not violated in the RICO context.

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154 *Id.* at 2104, 2105.

155 For cases involving successive prosecutions on RICO and underlying predicates, see United States v. Gonzalez, 921 F.2d 1530 (11th Cir.), *cert. denied*, 112 S. Ct. 178 (1991); United States v. Esposito, 912 F.2d 60 (3d Cir. 1990), *cert. dismissed*, 111 S. Ct. 806 (1991); United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, Virgilio v. United States, 111 S. Ct. 2009 (1991); United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987).

156 *See supra* notes 25-38 and accompanying text.

As the Supreme Court modified and refined double jeopardy analysis, however, RICO defendants tried to avail themselves of the increased protection. After *Ashe*, defendants argued that collateral estoppel precluded a subsequent trial on a RICO offense or its predicate because the court had already adjudicated the defendant's unlawful activity in the first proceeding.[157] Courts, however, have consistently rejected this argument, finding that proof of a RICO violation involves different issues of fact than those required to find a *per se* violation of state and federal criminal laws.[158]

Defendants raised similar assertions after *Brown* and *Harris*, arguing that RICO predicates are really lesser-included offenses in the substantive offense because they require no additional elements of proof beyond that necessary to establish the RICO violation.[159] Courts also rejected this argument, stating that RICO's legislative history and statutory language clearly indicated Congress's intent that the offenses be treated as distinct. To do otherwise would negate the remedial purpose of RICO.[160]

By rejecting these double jeopardy challenges, courts have upheld the purposes of RICO and removed any hindrance to effective law enforcement against organized crime. The *Grady* decision, however, requires courts to re-evaluate the merits of a double jeopardy challenge to RICO prosecutions.

B. Applying the *Grady* "Conduct" Test to RICO Criminal Prosecutions

While the *Grady* Court took great care to enunciate a new standard for double jeopardy analysis, it failed to clarify whether the conduct test completely *replaces* the current *Blockburger* standard or is

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157 *See, e.g.*, *Esposito*, 912 F.2d 60, 61; United States v. Ruggiero, 754 F.2d 927, 935 (11th Cir.), *cert. denied*, 471 U.S. 1127 (1985).

158 The argument against collateral estoppel is that a RICO substantive offense focuses on the *pattern* of illegal activity in an enterprise more than the per se illegal activity. For example, if a defendant were involved in drug trafficking and gambling, the prosecution would only have to show that these activities occurred and that they violate state laws. They would not have to show all the elements required to prove the offense, such as *mens rea*. *See, e.g.*, United States v. Russo, 801 F.2d 624 (2d Cir. 1990); United States v. Ryland, 806 F.2d 941 (9th Cir. 1986), *cert. denied*, 481 U.S. 1057 (1987).

159 *See, e.g.*, United States v. Hawkins, 658 F.2d 279, 288 (5th Cir. 1981); United States v. Persico, 620 F. Supp. 836, 845 (S.D.N.Y. 1985), *aff'd*, 774 F.2d 30 (N.Y. 1985).

160 *See, e.g.*, United States v. Boffa, 688 F.2d 919 (3d Cir. 1988); United States v. Hartley, 678 F.2d 961 (11th Cir.), *reh'g denied*, 688 F.2d 852 (1982), *cert. denied*, 459 U.S. 1170 (1983); United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); United States v. Forsythe, 594 F.2d 947 (3d Cir. 1979); United States v. Rone, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, Little v. United States, 445 U.S. 946 (1980). For a discussion of RICO and lesser-included offenses, see generally, Robert M. Grass, *Bifurcated Jury Deliberations in Criminal RICO Trials*, 57 FORDHAM L. REV. 745 (1989); Ciupak, *supra* note 48, at 386-93; Thomas, *supra* note 85, at 1368-86.

simply an additional step in the double jeopardy analysis. If the Supreme Court only created the *Grady* conduct test as an additional step, the *Blockburger* standard would be modified again to add a fourth tier to double jeopardy analysis. This new standard, *Blockburger-Grady*, would require courts to: first, compare statutory elements of the relative offenses; second, determine if the offenses were greater or lesser-included; third, perform a retrospective review of the prior proceedings, *and* fourth, look at the conduct underlying the offenses in the first trial. This result also implies that *Blockburger* would remain a rule of statutory construction. As applied to RICO prosecutions, this version of the *Grady* conduct test would give defendants little protection because Congress manifested a clear intent to permit RICO's enhanced penalties and to provide prosecutors with the greatest freedom to pursue RICO violations.

Alternatively, if the Court intended to completely replace *Blockburger*, then the conduct test returns double jeopardy analysis to a constitutionally based standard. *Grady* could be applied as a constitutional standard in two ways: literally and contextually. A literal application of the conduct test would restrict prosecutorial freedom, while a contextual application would create disparate constitutional treatment of defendants. In a RICO context, both applications yield inconsistent results.

The *Grady* Court stated that the conduct test precludes a second prosecution when "the government . . . will prove conduct that constitutes an offense for which the defendant has already been *prosecuted*."[161] Under a literal interpretation of this language, *Grady* precludes *all* subsequent prosecutions when the same criminal conduct is involved. In essence, *Grady* directs prosecutors to combine all charges arising out of a single criminal episode in one proceeding, or forfeit the opportunity to litigate the omitted offenses in a second trial. This "choose-it or lose-it" approach would severely restrict prosecutorial freedom.

Under RICO, before a substantive offense can be charged, the government must establish that the defendant engaged in two predicate acts which are chargeable under state or federal law.[162] Thus, whether *Grady* affords defendants any protection in successive prosecutions of a RICO offense and predicate acts ultimately depends

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161 *Id.* at 2093 (emphasis added).

162 18 U.S.C. § 1961(1) defines racketeering activity as:

> [A]ny act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. 18 U.S.C.A. § 1961(1) (West 1991).

on the *sequence* of the two proceedings. If the government first prosecuted a defendant on the predicate acts and subsequently relied on these acts to establish a substantive RICO violation, a literal application of *Grady* would compel a finding of unconstitutionality. If the order of prosecution were reversed, however, and the RICO offense was prosecuted *prior* to the predicate offense, then *Grady* would not preclude the subsequent prosecution.[163] Thus, a literal interpretation of the *Grady* conduct test results in disparate treatment of RICO defendants. Defendants prosecuted in one sequence (predicate offenses first, then RICO) would receive constitutional protection, while those prosecuted in the reverse sequence would not.

Alternatively, the *Grady* conduct test could be applied according to the context in which the case was decided. Some courts have construed *Grady* to apply only when there is a single defendant or single discrete act, and when the criminal offenses arose out of the same transaction or occurrence.[164] This approach, however, has little application in the RICO context, because RICO targets multiple offenders and multiple offenses.

A typical RICO prosecution usually joins several defendants, each of whom has performed a variety of illegal acts.[165] To establish the requisite pattern of racketeering, the government must allege violations of two predicate offenses. Furthermore, the definition of "patteru" contained in section 1961(5)[166] implies that these acts need not have occurred in the same transaction. As a result, this contextual application of the *Grady* conduct test in RICO would also produce skewed results. RICO defendants prosecuted in the first trial on predicate offenses that arose out of a single criminal episode would be constitutionally protected from a subsequent prosecution on a substantive RICO violation, while defendants with predicate offenses arising from different criminal transactions would not.

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163 For example, suppose defendant *Y* enagaged in an activity which gave rise to two predicate acts—drug dealing and bribery—and then, at a later date, also participated in a robbery. Assuming the requisite enterprise, if the State prosecuted *Y* for all three predicates *first* and subsequently relied on these same acts for a RICO indictment, *Grady* would bar the second prosecution. However, if the State brought the RICO violation *first*, relying only on the two predicate acts of drug dealing and bribery, a later prosecution for the robbery arguably would be permissible because the robbery constituted neither the same conduct, transaction, nor essential element of the first prosecution. *But see* Brown v. Ohio, 432 U.S. 161, 169 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.").

164 *See infra* notes 173-77 and accompanying text.

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

166 18 U.S.C. § 1961(5) (1988) ("[The second act must have] occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity").

Aside from the inconsistent results that the conduct test would yield in a RICO prosecution, *Grady* creates a more fundamental problem: tension between the goals of RICO and the Double Jeopardy Clause. RICO serves a dual purpose in that it not only targets organized criminal networks but also deters groups from engaging in the proscribed illegal activity in the future. RICO expands the resources of prosecutors by permitting joinder of multiple offenders and offenses in a single proceeding. In order to effectuate its goals of eradicating organized crime in legitimate business, RICO's structure necessarily implicates double jeopardy issues.[167]

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167 Comparatively, RICO could be considered analogous to habitual offender rules, which deter continuous criminal activity by imposing a more stringent penalty on a repeat offender. Habitual offender rules are similar to RICO in that they are legislatively created and designed specifically to target individuals engaged in continuous illegal activity. In addition, these rules enhance the criminal penalities imposed against repeat offenders. *See* 39 AM. JUR. 2D *Habitual Criminals and Subsequent Offenses* §§ 1-32 (1968 & Supp. 1991).

> The primary purpose of statutes authorizing additional punishment of a person convicted of a second or a subsequent offense is to warn first offenders and thus deter their criminal activities. [S]uch statutes are directed at persons who persist in criminality after once being convicted of an offense. A further purpose of such legislation is to promote justice and protect society by ridding communities of the depravity of unreformed criminals.

Id. § 3. *See also* People v. Johnson, 157 Cal. Rptr. 150, 153 (Cal. Ct. App. 1979)("[T]he increased penalty [imposed on a defendant] for a prior felony conviction . . . is to discourage recidivist criminal conduct."); Eutsey v. State, 383 So. 2d 219, 223 (Fla. 1980)(a state's habitual offender act is designed for the purpose of allowing enhanced penalties for defendant's recidivist behavior). For a comparative discussion of RICO and habitual offender rules, see William E. Dorigan & Alfred H. Edwall, Jr., *A Proposed RICO Pattern Requirement for the Habitual Commericial Offender*, 15 WM. MITCHELL L. REV. 35 (1989); Goldsmith, *supra* note 34.

Habitual offender rules also attempt to deter future activity by making an example of the recidivist. These rules have survived double jeopardy challenges primarily because courts have construed a State's interest in deterring recidivist conduct to outweigh the repeat offender's right to challenge the subsequent prosecution on double jeopardy grounds. *See, e.g.*, Gryger v. Burke, 334 U.S. 728, 732 (1948) (The court construed a state habitual offender act to be valid despite double jeopardy challenges of the petitioner. "The sentence as a fourth offender or habitual criminal is not to be viewed as either new jeopardy or [an] additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered . . . an aggravated offense because a repetitive one."); Carlesi v. New York, 233 U.S. 51, 58 (1914) (application of statute not barred by double jeopardy because "[it] is aimed at habitual criminals [and] the punishment is for the new crime only"); Curtis v. Eikenberry, 877 F.2d 802, 803 (9th Cir. 1989) ("The fact that the same issue was litigated in the prior habitual offender proceeding does not automatically raise the bar of double jeopardy."); Baker v. Duckworth, 752 F.2d 302, 304 (7th Cir.), *cert. denied*, 472 U.S. 1019 (1985) ("[T]he use of prior convictions to enhance a convict's sentence . . . does not violate the guaranty against double jeopardy beause the convict is not twice tried or punished for the same offense."). Similarly, the purpose of RICO is to provide enhanced penalties and additional legal remedies for use against those individuals who engage in criminal activity to further an enterprise.

The Double Jeopardy Clause protects an individual from unwarranted punishment and multiple prosecutions for the same offense. *Grady*, interpreted as a constitutional standard, maximizes this protection by ensuring that a defendant's conduct is only litigated once. The difficulty, however, is that *Grady* would not apply the constitutional standard consistently in the RICO context. Double Jeopardy protection should be paramount to legislative intent, and its protection should apply equally to all defendants. *Grady* applied in a RICO context, however, only protects parties in a particular sequence of RICO prosecutions. In effect, courts would have to hold RICO prosecutions for similar activities unconstitutional as to some defendants and constitutional as to others. This result is inconsistent with the goals of the Double Jeopardy Clause.

C. Resolving the Conflict Between Criminal RICO and the *Grady* "Conduct" Test

Whether RICO and the Double Jeopardy Clause can be reconciled ultimately depends on the Supreme Court's clarification of the *Grady* conduct test. Though few courts have interpreted *Grady*, two conflicting views about the breadth of the conduct test have already developed in the lower courts.

The first view, propounded by the Second Circuit, adopts a literal and expansive reading of *Grady*. In *United States v. Calderone*,[168] which involved successive prosecutions on conspiracy charges,[169] the court held that *Grady* barred the second prosecution for a "smaller" conspiracy because the State's new indictment alleged the same activities for which the defendant had been acquitted in first trial.[170] The court also rejected the State's two-fold argument that *Grady* should either be limited to its facts or held inapplicable to conspiracy prosecutions. The Court stated that "limit[ing] *Grady* to its facts mischaracterizes the intended scope of the Court's decision" and that "[a]lthough *Grady* involved the successive prosecution of separate crimes arising from a single event, nothing in the opinion suggests that the Court intended to limit the 'same conduct'

168 917 F.2d 717 (2nd Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3704 (1991).

169 In the first trial, the defendants Calderone, Catalano, and 26 others were indicted for involvement in an international drug conspiracy (the Adamita Indictment). *Id.* at 718. Calderone and Catalano were later acquitted of the conspiracy charges because of insufficient evidence. The government filed a new indictment (the Calderone Indictment) against Calderone and Catalano which essentially alleged the same activities and conspiracy charges raised in the Adamita Indictment but only alleged heroin distribution in the New York Metropolitan area. *Id.* at 718, 719. Calderone and Catalano, on appeal from denial of their motion to dismiss, raised the issue of double jeopardy in light of *Grady*.

170 *Id.* at 722.

test to those particular circumstances."[171] Thus, the Second Circuit position interprets the word "conduct" literally, reading *Grady* to apply to "*all* double jeopardy claims in the context of successive prosecutions."[172]

The Third Circuit, however, advocates a narrower interpretation of *Grady*, particularly in the context of successive RICO prosecutions.[173] In *United States v. Pungitore*,[174] a case which involved successive prosecutions for RICO violations and the underlying predicate offenses,[175] the court rejected a broad reading of *Grady* and held it to be inapplicable in a RICO context. The court stated that though "the language employed by the Supreme Court in its formulation of the 'same conduct' test could be interpreted as extending double jeopardy protection to all situations where the government intends again to prove conduct constituting an offense subject to an earlier conviction," *Grady* could not be easily applied in a RICO context.[176] Thus, the Third Circuit approach adopts a con-

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171 *Id.* at 721.

172 *Id.* The Second Circuit adopted a similar position in United States v. Russo, 906 F.2d 77 (2d Cir. 1990) (per curiam), where, in light of *Grady*, the court reversed the defendant's conviction for violating 18 U.S.C. §§ 1503 and 371—obstructing justice and conspiring to obstruct justice—because the offenses were predicate acts alleged in an earlier RICO prosecution from which he was acquitted. In this particular case, however, the government moved for remand for entry of a *nolle prosequi*. *Id.* at 78.

173 The Third Circuit advocates this narrower interpretation of the *Grady* holding not only for RICO, but also for similar complex criminal offenses. For example, Continuous Criminal Enterprise (CCE) prosecutions under 21 U.S.C. § 848 (1988) are similar to RICO indictments in terms of penalties and elements of proof required to establish a substantive violation. See *id.* §§ 848(a)-(c) defining continuous criminal enterprises and penalties. For a good comparative discussion of CCE and RICO, see Barbara Sicalides, Comment, *RICO, CCE, and International Extradition*, 62 TEMP. L. REV. 1281 (1989).

174 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2011 (1991).

175 *Pungitore* involved a number of defendants convicted for CCE as well as RICO violations. Specifically, defendant Nicodemo Scarfo was convicted for conspiracy and extortion in violation of RICO, but was acquitted in a prior trial for CCE violations. *See id.* at 1107. On appeal, Scarfo relied on *Grady* and argued that acquittal in the first trial of the conspiracy and extortion charges, which formed the predicate acts for the RICO violation, precluded a second prosecution on a substantive RICO offense. *Id.*

Judge Greenberg, writing for the majority, rejected Scarfo's expansive reading of the *Grady* holding.

> We conclude that *Grady*, which finds its roots in "single transaction" cases such as *Brown*, is no more applicable in the instant circumstances than *Brown* was in *Garrett*. . . . Thus, we reject Scarfo's double jeopardy argument on the basis of *Grayson*, in which we decided that successive prosecutions of RICO and its underlying predicates are constitutionally permissible, and *Garrett*, which distinguished single course of conduct crimes, like those in *Brown* and *Grady*, from compound-complex crimes, like those at issue here. However significant *Grady v. Corbin* may prove to be in cases of simple felonies, *we are confident that it has nothing whatsoever to do with the compound-complex crimes at issue here.*

Id. at 1111 (emphasis added).

176 *Id.* at 1110. The Third Circuit reached a similiar result in United States v. Esposito, 912 F.2d 60 (3d Cir. 1990), *cert. dismissed*, 111 S. Ct. 806 (1991), which raised the

textual interpretation of *Grady*, limiting its applicability to single-offense situations.[177]

Without consensus in the circuit courts as to the proper interpretation of the conduct test, *Grady's* precedential value is suspect. Several commentators[178] agree with Scalia's assessment that *Grady* is "unlikely to survive."[179] The Supreme Court will eventually have to clarify whether *Grady* should be taken at face value and held applicable to all successive prosecutions that involve any conduct identical to the first proceeding, or whether it should be confined to its facts and read only to apply to single offense or separate transaction crimes (which excludes the more complex criminal offenses such as RICO and CCE).

The Court will probably decide *Grady's* fate later this term in *United States v. Felix*,[180] a Tenth Circuit decision currently pending before the Supreme Court. *Felix* involved successive prosecutions for conspiracy and narcotics violations arising out of a single trans-

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issue of whether double jeopardy barred a subsequent prosecution on predicate acts after an acquittal on a substantive RICO charge.

> "[W]e conclude that the even more complex conduct needed to support a RICO charge, such as the requirement of both an enterprise and a pattern of activity, constitutes an offense different than and separate from that encompassed by the narcotics charges alleged here. . . . [H]ence, *Grady* does not mandate a finding that this prosecution is barred by double jeopardy.

Esposito, 912 F.2d at 65.

177 *See also* United States v. LeQuire, 943 F.2d 1554, 1559 (11th Cir. 1991) (construing *Grady* to be "more applicable in single offense situations, such as drunk driving").

178 *See, e.g.*, Thomas, *supra* note 102, at 195-96 ("[I] also believe the lack of articulated limitations on the principle [in *Grady*] renders the 5-4 decision. . .unstable. . . . Moreover, I agree with Scalia's prediction of [*Grady*'s] future if it remains in its current form. . . ."); Barton, *supra* note 102, at 166 ("Regardless of which approach it ultimately chooses to adopt, however, the Court should affirmatively dismantle *Grady*'s 'same conduct' test before it self-destructs in the lower courts."). *But cf.*, Herrick, *supra* note 102, at 866:

> The basic rule [of *Grady*] is likely to prevail nonetheless, since only a 'same conduct' standard can adequately protect defendants against potential abuse of the power to define offenses. With 'conduct' as the guide, the double jeopardy clause can more thoroughly embody the practical protections it was meant to afford.

Id.

179 Grady v. Corbin, 110 S. Ct. 2084, 2104-05 (1990) (Scalia, J., dissenting):

> A limitation that is so unsupported in reason and so absurd in application is unlikely to survive. . . . One can readily imagine the words of our first opinion effecting this extension: "When we said in *Grady* that the second prosecution is impermissible if it 'will prove conduct' that constitutes the prior offense, we did not mean that it will establish commission of that offense with the degree of completeness that would permit a jury to convict. It suffices if the evidence in the second prosecution 'proves' the previously prosecuted offense in the sense of tending to establish one or more of the elements of that offense."

180 926 F.2d 1522 (10th Cir.), *cert. granted*, 112 S. Ct. 47 (1991).

action that traversed two states.[181] The transaction began in Tulsa, Oklahoma, where the defendant Felix purchased the equipment and chemicals necessary to process narcotics.[182] In a separate transaction, Felix ordered additional materials which were transported to a trailer in Joplin, Missouri.[183] In Missouri, Felix was convicted for "attempt[ing]-to-manufacture" methamphetamine based on evidence seized from the trailer.[184] Subsequently, Felix was indicted and convicted in Oklahoma for "conspiracy, manufacture, and possession with the intent to distribute methamphetamine."[185] The court reversed Felix's conviction, holding that "under the clear principle pronounced in *Grady* . . . the successive prosecution of Felix in Oklahoma for the same conduct for which he was previously convicted in Missouri violated the Double Jeopardy Clause."[186] The Tenth Circuit thus followed the Second Circuit approach and stated that though few courts have interpreted *Grady*, "its intended breadth is obvious from its language."[187]

Felix presents the Supreme Court with a prime opportunity to reformulate the *Grady* conduct test. It also gives the Court a second chance[188] to clarify the meaning of "conduct" as applied to single and multiple transactions as well as simple and complex criminal offenses such as RICO. In light of the purposes of RICO, the varied interpretations of *Grady*, and the potentially inconsistent results yielded by an unmodified *Grady* conduct test, the optimal solution is to limit *Grady* to its facts and hold it inapplicable in a RICO context.

CONCLUSION

The Double Jeopardy Clause seeks to ensure that defendants are protected from excessive punishments and unwarranted multiple prosecutions. The Supreme Court's double jeopardy analysis has developed to further these goals and the *Grady* conduct test creates a single standard that maximizes double jeopardy protection.

Congress enacted RICO to provide prosecutors with additional legal remedies to combat the increased infiltration of organized

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181 *Id.* at 1524-25.

182 *Id.* at 1524.

183 *Id.* at 1523.

184 *Id.*

185 *Id.* at 1524 n.1. At pretrial, Felix brought a motion to dismiss based on double jeopardy grounds arising from the Missouri conviction. The trial judge denied the motion, finding the conspiracy and the "attempt-to-manufacture" methamphetamine offenses separate. *Id.* at 1525.

186 *Id.* at 1530.

187 *Id.* at 1527.

188 With Justice Brennan's retirement, whether the current Court will "rewrite" the *Grady* conduct test is almost a foregone conclusion.

crime into legitimate business. To achieve this goal, RICO incorporates existing state and federal offenses and enhances criminal penalties that are designed to target group activity and deter continued criminal conduct. The nature of a RICO prosecution necessarily implicates double jeopardy issues. In light of the congressional intent of the Act, achieving the goals of RICO requires treating current double jeopardy analysis as inapplicable in the RICO context.

Grady and RICO are mutually exclusive and until the Supreme Court rectifies the anomalies created by the conduct test, *Grady* should not be viewed as the Achilles's heel of criminal RICO. The proper resolution is to confine *Grady* to its facts and construe the decision as inapplicable in a RICO context.

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