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Double Jeopardy's Door Revolves Again in *United States v. Dixon*: The Untimely Death of the "Same Conduct" Standard

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CASENOTE

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I. INTRODUCTION

The Fifth Amendment guarantee against subjecting a criminal defendant to double jeopardy for the "same offence"[1] is a source of great confusion and division among judges, lawyers, and legal scholars. Much of the confusion stems from attempts by the United States Supreme Court to apply a single test to multiple punishments for the same offense, successive prosecutions for the same offense after acquittal, and repeated prosecutions for the same offense after conviction.[2] In 1990, in *Grady v. Corbin*,[3] the Court significantly expanded the scope of double jeopardy protection against successive prosecutions by adding an additional prong to the traditional "same elements" test.[4] The "same elements," or "*Blockburger*," test requires that a prosecution for a second offense contain an element that was not an element of the previously prosecuted offense.[5] *Grady* added a "same conduct" standard, which provided that if the State, in order to establish an essential element of a crime, must prove conduct for which the defendant already has been

1. The Double Jeopardy Clause states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

2. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

3. 495 U.S. 508 (1990).

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

5. *Id.*

prosecuted, the Fifth Amendment bars the prosecution.[6] Recently, in *United States v. Dixon*,[7] the Court overturned the *Grady* test because it "lacked constitutional roots" and produced confusion.[8] This Note analyzes the practical and theoretical significance of this unusually sudden reversal of Supreme Court precedent.

Part II of this Note surveys the line of cases that attempted to define what constitutes a "same offense" under the Fifth Amendment. Part III details the factual background and divided holding of *Dixon*. Part IV analyzes and compares the theoretical soundness of the majority, concurring, and dissenting opinions in *Dixon*, as well as the practical repercussions of *Grady* before its reversal. Part V concludes that although the "same conduct" test was flawed, the Court did not give lower courts enough time or guidance to develop a workable alternative standard. The *Dixon* Court's fractured holding does not meet the majority's stated goal of creating a clear standard, and the Court abandoned important Fifth Amendment protections by allowing the State to prosecute multiple times for essentially the same illegal act.

II. HISTORY OF "SAME OFFENSE"

The Court's historical difficulty in defining "same offense" under the Fifth Amendment has been influenced by the changing relationship between the judiciary and the legislature. The dramatic increase in overlapping and similar criminal offenses substantially increased the risk that a defendant would be subject to multiple prosecutions for the same conduct.[9] The numerous tests and exceptions created in the attempt to define "same conduct" reflect the Court's struggle to determine not only whether two offenses are sufficiently similar to trigger Fifth Amendment protection, but also where the fundamental balance of power between the judicial and legislative branches should lie.

The traditional definition of "same offense" was enunciated in *Blockburger v. United States*,[10] in which the Court upheld multiple convictions of a defendant for selling morphine without a written order and selling morphine after removing it from its original package.[11] This "same elements" test consisted of an inquiry into whether either of two statutes requires "proof of an additional fact which the other does not."[12] Thus, the *Blockburger* Court focused exclusively on the separate ele-

6. *Grady*, 495 U.S. at 510.
7. 113 S. Ct. 2849 (1993).
8. *Id.* at 2860.
9. *See* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970).
10. 284 U.S. 299 (1932).
11. *Id.* at 300.
12. *Id.* at 304. The Court based this proposition on Gavieres v. United States, 220 U.S. 338,

ments of the crimes without regard to the fact that a single act violated both statutes.[13] The Court noted that if the cumulative penalties seemed unduly harsh, "the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction."[14] While *Blockburger* remained the sole double jeopardy test for more than fifty years, it is significant that at its inception far fewer distinct criminal statutes existed than at present.[15] The attempts to reconcile a definition based on statutory distinction with the explosion of criminal legislation in the twentieth century caused much of the well-documented confusion in double jeopardy jurisprudence.[16]

The *Blockburger* test, because it originally applied only to cumulative punishments,[17] spawned confusion when applied to multiple prosecutions as well. The Court, however, extended the test to include cases involving multiple prosecutions for similar offenses, even though this raised a separate set of double jeopardy concerns.[18]

The strands of double jeopardy analysis for multiple punishment and multiple prosecutions split in *Missouri v. Hunter*.[19] The *Hunter* Court significantly reinterpreted *Blockburger* to be a rule of statutory construction rather than a test to determine a constitutional right.[20] The Court upheld a conviction for armed robbery and armed criminal action, reasoning that two statutes with the same elements create only a rebuttable presumption that the legislature did not intend cumulative punishments.[21] This decision significantly narrowed the protection of *Blockburger* by allowing the legislature, in effect, to override the Fifth

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343 (1911). *Gavieres* arguably holds that double jeopardy analysis should not extend beyond statutory comparisons in the context of multiple prosecutions.

13. A hypothetical can clarify this test: A defendant commits an unlawful act that violates statutes *A* and *B*. Statute *A* contains elements *X* and *Y* and statute *B* contains elements *Y* and *Z*. The two offenses are distinct because despite arising from the same act they require different elements of proof. Conversely, if statutes *A* and *B* each contained elements *X*, *Y*, and *Z*, then *Blockburger* would bar conviction for both offenses because they are technically the same offense. *See, e.g.*, United States v. Bennett, 702 F.2d 833, 835 (9th Cir. 1983). *Bennett* also held that *Blockburger* may be satisfied despite substantial evidentiary overlap. *Id.*

14. 284 U.S. at 305.

15. *See* Ashe v. Swenson, 397 U.S. at 445 n.10.

16. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 343 (1981) (describing double jeopardy case law as "a veritable Sargasso Sea").

17. Cumulative punishment refers to the imposition of separate penalties for separate offenses arising out of a single criminal transaction. *See* Ball v. United States, 470 U.S. 856, 860 n.7 (1985).

18. In a case decided before *Blockburger*, the Court indicated that the Fifth Amendment protected against multiple prosecutions following acquittal by a different sovereign for the same conduct. *In re* Nielsen, 131 U.S. 176 (1889).

19. 459 U.S. 359 (1983).

20. *Id.* at 368-69.

21. *Id.* at 366-69.

Amendment merely by indicating its intent to impose multiple punishments.[22] This reinterpretation of *Blockburger* in the multiple punishment context added further difficulty to fashioning a coherent application of the Double Jeopardy Clause.[23]

A. *Exceptions to* Blockburger

The dangers of multiple prosecutions differ from the dangers of multiple punishments. Repeated attempts to convict a defendant cause embarrassment, expense, and a continuing state of anxiety and insecurity.[24] A second prosecution also increases the risk of a wrongful conviction by allowing the State to rehearse its presentation of proof.[25] These concerns led to several exceptions to the strict *Blockburger* analysis in multiple prosecution context.

The Court initially recognized the need for greater protection against multiple prosecutions by creating a "collateral estoppel" exception to *Blockburger*, in *Ashe v. Swenson*.[26] In *Ashe*, a jury acquitted the defendant of a gang robbery of one of six poker players.[27] A central issue at the trial was the robber's identity.[28] The State then prosecuted the defendant for the robbery of a different poker player at the same game.[29] Under *Blockburger*, the second prosecution is allowable because different victims create a distinction in the elements of proof. In fact, the defendant could have been prosecuted six separate times for the same act against separate victims. The *Ashe* Court responded by expanding double jeopardy analysis to include a factual comparison of the two proceedings.[30] If the first trial resulted in an acquittal based on the resolution of a factual issue that was an essential element of the charge, the State was precluded from relitigating the issue under the doctrine of "collateral estoppel."[31]

Justice Brennan, in a concurring opinion, suggested that the Court needed to go further to give substance to the Double Jeopardy Clause in modern criminal procedure. He advocated a "same transaction" test that required prosecutors to join all charges arising out of a single act in a

22. *See* Thomas J. Hickey, *Double Jeopardy After* Grady v. Corbin, 28 CRIM. L. BULL. 3, 12-15 (1992).

23. *Id.* at 15.

24. Green v. United States, 355 U.S. 184, 187 (1957).

25. *See, e.g.*, Tibbs v. Florida, 457 U.S. 31, 41 (1982); Hoag v. New Jersey, 356 U.S. 464, 467 (1958).

26. 397 U.S. 436 (1970).

27. *Id.* at 438-39.

28. *Id.* at 438.

29. *Id.* at 439.

30. *Id.* at 444.

31. *Id.* at 443-44.

single proceeding.[32] Brennan argued that only this standard would protect defendants from vexatious multiple prosecutions and promote judicial economy and convenience.[33] Although Brennan advocated this position in numerous cases, a majority of the Court has always considered the test too broad.[34]

The Court, in *Brown v. Ohio*,[35] further expanded the scope of double jeopardy protection to include an exception for consecutive prosecutions of greater and lesser offenses by analogizing similar offenses to "lesser included offenses." Under *Blockburger*, a greater offense could be tried after a lesser offense because of the existence of an additional element. The *Brown* Court held that a greater and a lesser included offense are the "same offense" when the same facts would prove both offenses.[36] Except in situations where the State could not have found evidence of the greater offense, prosecution for a greater offense after prosecution for a lesser offense was barred.[37]

In *Harris v. Oklahoma*,[38] the Court extended the exception to include barring prosecution for a lesser offense after prosecution for a greater offense. The significance of this decision hinges on the Court's expansion of lesser included offenses to include offenses with statutorily distinct elements. The defendant was convicted of felony murder based on an underlying charge of armed robbery, and was also convicted of the robbery charge.[39] Although robbery is not a literal element of felony murder, the Court held that conviction for a greater crime bars prosecution for a lesser one where conviction of the greater cannot be had without conviction of the lesser.[40]

In *Illinois v. Vitale*,[41] the Court took a tentative step toward adding a significant second tier of protection against multiple prosecutions. The

32. *Id.* at 454-55 (Brennan, J., concurring).

33. *Id.* at 454.

34. *See* Garrett v. United States, 471 U.S. 773, 790 (1985) (refusing to adopt a "single transaction" view of the Double Jeopardy Clause). Justice Scalia argued in his *Grady* dissent that the Court was adopting a functional version of the "same transaction" test. Grady v. Corbin, 495 U.S. 508, 543 (1990) (Scalia, J., dissenting). *Grady* did not survive long enough to see whether Scalia was correct.

35. 432 U.S. 161 (1977). In *Brown*, the defendant was charged under Ohio's "joyriding" statute which stated: "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." *Id.* at 162 n.1. After pleading guilty to this charge and serving prison time, Brown was charged with and convicted of auto theft stemming from the same event. *Id.* at 162-63. The Supreme Court held that "joyriding" was actually a lesser included offense of Ohio's auto-theft statute. *Id.* at 168.

36. *Id.* at 169.

37. *Id.* at 169 n.7.

38. 433 U.S. 682 (1977). The *Brown* test was considered dicta until applied in *Harris*.

39. *Id.* at 682.

40. *Id.*

41. 447 U.S. 410 (1980).

defendant Vitale struck and killed two children while driving, and he received a traffic citation for "failing to reduce speed to avoid an accident."[42] After a bench trial, he was convicted and sentenced to pay a $15 fine.[43] Subsequently, Vitale was charged with two counts of involuntary manslaughter.[44] The Supreme Court addressed the issue of whether the second prosecutions were barred by the earlier conviction based on the "lesser included offense" analysis developed in *Harris* and *Brown*. Whether the second prosecutions passed the *Blockburger* test—whether failure to reduce speed was a statutory element of manslaughter—was unclear.[45] Justice White, however, writing for the Court, concluded that the analysis does not end with *Blockburger*.[46] The Court remanded the case with specific guidelines:

> [I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and . . . *Harris* . . . .[47]

This dicta became the foundation of the *Grady* "same conduct" test.

Vitale shifted the Court away from its statute-based analysis to an expansion of the fact-based analysis of collateral estoppel. The *Harris-Brown* analysis corrected the situation in which a defendant could be found guilty of exactly the same crime for which he had been previously acquitted. For example, in a felony-murder case, a jury could find a defendant guilty of either the underlying felony or the murder. A defendant who has been acquitted of the underlying felony is thus again at risk of conviction of that felony.

The *Vitale* dicta describes the danger of subjecting a defendant to successive prosecutions involving proof of the same conduct. The Court remanded the case to the state court precisely because it could not determine if the State necessarily must use proof of the defendant's failure to reduce speed in order to prove this particular instance of manslaughter. If "failure to slow" is necessary to prove manslaughter, *Vitale* suggests that under certain circumstances, "failure to slow" may be sufficiently analogous to a lesser included offense that the statutes are not suffi-

42. *Id.* at 411. The prosecution was based on an Illinois traffic statute. ILL. REV. STAT., Ch. 95 1/2, § 11-601(a) (1979). *Id.*

43. *Id.* at 412.

44. *Id.* at 413.

45. *Id.* at 421.

46. *Id.* at 419.

47. *Id.* at 420.

ciently distinct. Yet the Court allowed a second option: If the court does not find it necessary to prove failure to slow, the State must attempt to prove the manslaughter charge without offering evidence that would prove a failure to slow. Thus the Court was attempting to use the *evidence* offered by the State to determine whether two offenses are *constitutionally* distinct.[48] This intermingling of factual and statutory analysis became a major factor in the ultimate reversal of this test.[49]

Harris correctly focused on whether the offense was analogous to an element of the greater offense, and not the manner in which the State sought to prove its case. The reliance in *Vitale* on *Harris* can be justified only if *Harris* stands for the broad proposition that courts may go beyond a literal comparison of statutory elements to determine the meaning of "same offense."

B. *The "Same Conduct" Test*

The Court adopted the "same conduct" standard proposed in *Vitale* in *Grady v. Corbin*.[50] The facts of *Grady* were similar to those of *Vitale*. The defendant, a drunken driver, struck two vehicles killing the driver of one.[51] He pleaded guilty in Town Court to two traffic tickets charging him with driving while intoxicated and failing to keep right of the median.[52] Through a series of errors "that would have made the Marx Brothers proud,"[53] the traffic court prosecutor, unaware of the case details, recommended a minimum sentence.[54] The presiding judge sentenced the defendant to a $350 fine and revoked his license for six months.[55] Subsequently, a grand jury indicted Corbin for reckless manslaughter, second-degree vehicular homicide, criminally negligent homicide, third-degree reckless assault, and driving while intoxicated.[56] The prosecution filed a bill of particulars indicating that the State, in order to prove the charges, would rely on the defendant's intoxication while driving, failure to keep on the right of the median, and driving at an unsafe speed in heavy rain.[57]

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48. The dissenters in *Grady* expressed confusion over how the "same conduct" test differed from the "same evidence" test. Grady v. Corbin, 495 U.S. 508, 526-44 (1990) (Scalia, J., dissenting).

49. *See* United States v. Dixon, 113 S. Ct. 2849, 2861-64 (1993).

50. 495 U.S. 508 (1990).

51. *Id.* at 511.

52. *Id.* at 511-12.

53. George C. Thomas III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195, 199 (1991).

54. *Grady*, 495 U.S. at 513.

55. *Id.*

56. *Id.*

57. *Id.* at 513-14.

Justice Brennan, writing for a 5-4 majority, stated 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."[58] This created a two-step test for double jeopardy. First, a court must compare the statutory elements of the offenses in question and apply the *Blockburger* test to determine whether the legislature intended separate offenses.[59]

Second, a court must apply the "same conduct" test as enunciated by Brennan. Applying this test to the facts of *Grady*, the second prosecution passes the first step of the analysis because drunken driving and crossing the median are not always necessary elements of assault or manslaughter. The prosecution is barred, however, under the "same conduct" step because the State admitted in its pleadings that it would prove the conduct that constituted the traffic offenses in order to prove the elements of the manslaughter offense. The State could have avoided the double jeopardy bar by relying solely on evidence of some other conduct, such as driving too fast for the weather, in order to establish recklessness. This possibility distinguishes the "same conduct" test from the "same transaction" test that Brennan advocated in *Ashe*. When there was no bill of particulars stating the prosecution's theory, Brennan suggested adopting a test that would shift the burden of proof of separate offenses to the state after a non-frivolous showing by the defendant that an indictment places him in double jeopardy.[60]

Brennan also distinguished the "same conduct" standard from the "same evidence" test.[61] The "same conduct" test is both broader and narrower than the "same evidence" test. The "same evidence" standard disallows the use of particular evidence in successive prosecutions regardless of what the evidence is being offered to prove. This does not narrowly protect double jeopardy interests because, for example, testimony regarding the clothing a defendant was wearing on a particular night may be used to prove separate crimes committed on the same night without subjecting the defendant to double jeopardy. Since *Blockburger*, the Court has repeatedly rejected this standard. The "same con-

58. *Id.* at 521.

59. *Id.* The legislative-intent component of the *Blockburger* test is a new component. *See* Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

60. *Grady*, 495 U.S. at 522 n.14. Brennan noted that all federal circuits had adopted this system. *Id.*; *see, e.g.*, United States v. Ragins, 840 F.2d 1184, 1192-93 (4th Cir. 1988). Although Brennan failed to address Scalia's concerns about the defense proving the conduct to force double jeopardy or what standard of proof the prosecution must meet before the conduct is considered proved, *Grady* does not mandate Scalia's result.

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

duct" test allows the same evidence to be used to prove different conduct, but disallows, for example, a different witness testifying to prove conduct that was previously litigated.

Justice Scalia bitterly criticized this new test for being impossible to implement without implicitly adopting the "same transaction" test that had been expressly rejected by the Court.[62] He also attacked the test as a misinterpretation of *Brown* and *Harris*, and characterized *Vitale* as unsupported dicta.[63] He characterized the test as an arbitrary expansion of the Double Jeopardy Clause because it allows proof of conduct that constitutes *part* of an offense, but disallows the same proof when it constitutes an *entire* offense.[64]

Scalia also disapproved of the Court's reliance on *Vitale* as precedent, because the *Vitale* Court merely stated that the defendant would have a "substantial" claim that double jeopardy barred the second prosecution.[65] However, this distinction is not persuasive because the *Vitale* Court had no reason for remanding the case if it had not intended to find such a double jeopardy bar in the event that "failing to reduce speed" was an essential element of proof.

The Supreme Court created an important exception to *Grady* in *United States v. Felix*.[66] Lower courts divided on the application of *Grady* to prosecutions for conspiracy after prosecutions for the substantive offense that the defendants conspired to commit.[67] A strict application of the "same conduct" test would bar prosecution because the state would need to prove the underlying conduct. This application overprotects double jeopardy interests in order to prove the conspiracy by preventing the State from using evidence that is highly persuasive but not analogous to a lesser included offense.[68] It also highlights an incon-

62. *See id.* at 527 (Scalia, J., dissenting).

63. *Id.* at 537.

64. *Id.* at 541.

65. *See* Illinois v. Vitale, 447 U.S. 410, 420 (1980).

66. 112 S. Ct. 1377 (1992). The defendant in *Felix* was convicted of a substantive drug offense in one trial and subsequently convicted of conspiracy to manufacture methamphetamine. *Id.* at 1379-80.

67. *Compare* United States v. Calderone, 917 F.2d 717, 721-22 (2d Cir. 1990) (upholding a double jeopardy claim because the "conduct" at issue in a conspiracy claim is not the agreement itself, but the acts that the state uses to infer an agreement) *and* United States v. Gambino, 920 F.2d 1108, 1112 (2d Cir. 1990) (holding that *Grady* bars prosecution for conspiracy following prosecution for the substantive acts that the defendants allegedly conspired to do) *and* United States v. Felix, 926 F.2d 1522 (10th Cir. 1991), *rev'd*, 112 S. Ct. 1377 (1992) *with* United States v. Rivera-Feliciano, 930 F.2d 951, 954-55 (1st Cir. 1991) (determining that double jeopardy does not bar conspiracy charges based on previously prosecuted conduct) *and* United States v. Clark, 928 F.2d 639 (4th Cir. 1991).

68. *See Grady*, 495 U.S. at 524-26 (O'Connor, J., dissenting).

sistency between *Grady* and *Dowling v. United States*.[69] In *Dowling*, the Court held that evidence of a crime that the defendant was acquitted of could be used in a later prosecution to prove identity or method.[70]

The *Felix* Court held that the *Grady* test did not apply to conspiracy cases because of the established doctrine that conspiracies were distinct from substantive offenses.[71] The Court's rationale rested on the Court's historical treatment of conspiracy offenses prior to *Grady* and a cryptic message that *Grady* should not be read too literally.[72] The Court's decision resolved the main area of post-*Grady* confusion in the lower courts. Yet the Court's failure to offer further guidance on the appropriate limits of the "same conduct" test betrayed the Court's disinclination to fashion a consistent application of the standard.

III. *UNITED STATES V. DIXON*

United States v. Dixon[73] involved a defendant who was released on bond pending his trial for second-degree murder.[74] Dixon's release was conditional and the commission of "any criminal offense" would subject him to prosecution for contempt of court.[75] Before the murder trial, Dixon was arrested and indicted for possession of cocaine with intent to distribute.[76] Following an evidentiary hearing, the judge concluded that the State had proved the cocaine charge beyond a reasonable doubt and convicted Dixon of criminal contempt.[77] The trial court later dismissed the cocaine indictment on double jeopardy grounds.[78]

In a companion case, defendant Foster also raised a double jeop-

69. 493 U.S. 342 (1990). The defendant allegedly wore a ski mask in two separate robberies, and was acquitted of the first. The Court held that evidence that the defendant wore the ski mask in the first robbery was admissible at trial for the second, despite the defendant's prior acquittal, because the standard of proof for the admission of evidence was lower than "beyond a reasonable doubt." *Id.* at 348.

70. *Id.*

71. *Felix*, 112 S. Ct. at 1384; *see* United States v. Bayar, 331 U.S. 532 (1947) (holding that because the essence of a conspiracy crime is the agreement to commit an offense, double jeopardy did not bar prosecutions for discrediting the military service and conspiring to defraud the U.S. government based on the same conduct of accepting bribes).

72. *Felix*, 112 S. Ct. at 1383-84.

73. 113 S. Ct. 2849 (1993).

74. *Id.* at 2853.

75. *Id.* The District of Columbia's bail law authorized the judge to impose any condition that would "reasonably assure . . . the safety of any other person or the community . . . ." D.C. CODE ANN. § 23-1321(a) (1989). The contempt of court sanction was also specifically authorized. D.C. CODE ANN. § 23-1329(a) (1989).

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

77. *Id.* The District of Columbia allowed contempt sanctions after an expedited hearing without a jury; the maximum sentence was six months' imprisonment and a $1000 fine. D.C. CODE § 23-1329(c) (1989).

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

ardy claim after his conviction for contempt of court. Based on allegations of domestic abuse, Foster's wife obtained a civil protection order (CPO) requiring that he not molest, assault, or threaten her.[79] During the next eight months, Foster's wife alleged sixteen violations of the CPO, including three instances of threats and two assaults.[80] The trial court held a three-day bench trial in which the court required that in order to prove the assault violations for criminal contempt purposes, Foster's wife had to prove two elements: that a CPO existed at the time of the alleged attacks, and that the assaults "as defined by the criminal code" took place.[81] The court acquitted Foster of the threats, but convicted him of criminal contempt of court arising from the two assaults.[82]

The U.S. Attorney's Office then obtained an indictment charging Foster with simple assault, threatening to injure another, and assault with intent to kill. The first and last charges were based on the events for which Foster had been found in contempt.[83] The trial court denied Foster's motion to dismiss the indictment on double jeopardy grounds, and Foster appealed.[84]

The State appealed the trial court's ruling on Dixon's double jeopardy claim,[85] and the District of Columbia Court of Appeals consolidated the *Foster* and *Dixon* cases. The appellate court held, in light of *Grady*, that the Double Jeopardy Clause mandated dismissal of both subsequent prosecutions.[86] The Supreme Court granted certiorari to resolve whether "the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court."[87]

A. *The Scalia-Rehnquist Axis: The Demise of* Grady

Despite the Justices' division on the scope of the *Blockburger-Harris* standard, a 5-4 plurality of the Court overruled the "same conduct" test.[88] Justice Scalia, joined by Justice Kennedy, wrote that *Grady*

79. *Id.* at 2853-54. A CPO could be issued if the complainant established good cause to believe that the subject was threatening an offense against a family member. D.C. CODE ANN. § 16-1005(c) (1989).

80. *Dixon*, 113 S. Ct. at 2854. The most serious allegation was that Foster threw his wife down the stairs, kicked her, and pushed her head into the floor causing her to lose consciousness. *Id.* The other 11 allegations were not relevant to the case.

81. *Id.*

82. *Id.* Foster was sentenced to 600 days imprisonment. *Id.*

83. *Id.*

84. *Id.* The trial court did not rule on Foster's collateral estoppel claim. *Id.*

85. *Id.*

86. United States v. Dixon, 598 A.2d 724, 725 (D.C. 1991), *rev'd*, 113 S. Ct. 2849 (1993).

87. *Dixon*, 113 S. Ct. at 2854.

88. *Id.* at 2860.

should be overruled, but that the element of "violating a contempt order" could not be considered a separate element under the *Blockburger* standard. Convictions that could not be distinguished from the elements within the contempt order should be overruled.[89] Chief Justice Rehnquist, joined by two other Justices, wrote that *Grady* should be overruled, and that any difference in the elements of a crime, including violation of a contempt order, allows for multiple prosecutions under the Fifth Amendment.[90] The remaining four Justices voted to uphold *Grady*.[91] These dissenters would have dismissed all counts in the second prosecutions of Dixon and Foster, except for Justice Blackmun, who wrote separately to support an exception to the "same conduct" test in the contempt area.[92]

Both Justice Scalia and Justice Rehnquist overruled *Grady* because they claimed the *Grady* test could not be applied in practice without creating a broad "same transaction" standard, lacked historical precedent, and caused confusion among the lower courts.[93] Both opinions converge in their abandonment of *Grady* but differ on the scope of the standard that remains. Ironically, the same Justices who criticized *Grady* for its lack of clarity left the lower courts with a fractured decision on the current standard.

IV. ANALYSIS

A. *Was* Grady *"Unworkable in Practice"?*

Any departure from the doctrine of stare decisis demands special justification.[94] The most obvious justification for the quick abandonment of the "same conduct" test would be that the *Grady* dissenters were correct that the test was impractical. In the three years that *Grady* was good law, however, there was little evidence that the test could not have been applied without creating a "same transaction" test.[95]

Justice Scalia used hypotheticals in *Grady* to show how the "same conduct" test would bar prosecution in too many cases.[96] Justice Scalia suggested that, if a defendant were prosecuted for burglary, the State could never subsequently prosecute the defendant for a murder in the course of that burglary, because the State would have to prove burglary

89. *Id.* at 2860-64.

90. *Id.* at 2865-68 (Rehnquist, C.J., concurring). Justices O'Connor and Thomas joined this opinion.

91. *Id.* at 2868-2890. Justices Souter, White, Blackmun, and Stevens dissented.

92. *Id.* at 2879-81 (Blackmun, J., dissenting).

93. *See id.* at 2860; Grady v. Corbin, 495 U.S. 508, 526-44 (1990) (Scalia, J., dissenting).

94. *See* Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

95. *See Dixon*, 113 S. Ct. at 2889 (Souter, J., dissenting).

96. *See Grady*, 495 U.S. at 539 (Scalia, J., dissenting).

as a motive for the murder.[97] *Grady* does not necessarily support this hypothetical result. Justice Scalia failed to distinguish conduct that is required to prove an element from conduct that is merely persuasive.[98] In fact, the trend in the lower courts before *Dixon* was to interpret *Grady* far more narrowly than the "same transaction" test that Justice Scalia predicted would be used.[99]

The other major factor used by the *Dixon* majority to support its claim of impracticality was that the test was too confusing for lower courts to apply.[100] Several commentators had suggested that the need for a uniform standard was more important than the greater protection that the *Grady* test provided.[101] The dissenters vigorously argued that departure from *Grady* was not justified merely because two courts of appeals decisions described it as difficult to apply.[102]

Although lower courts did interpret the "same conduct" test in a variety of ways, Justice Scalia's use of this rationale seems less compelling in light of the high degree of confusion in the double jeopardy area before *Grady*.[103] In fact, some lower courts were confused by Scalia's dissent in *Grady* and treated his prediction of an expanded test as an invitation to interpret *Grady* broadly.[104] Almost all of the cases Scalia used to support his theory that *Grady* caused too much confusion were cases involving successive conspiracies,[105] an issue that was signifi-

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97. *See id.*

98. *See* James M. Herrick, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in* Grady v. Corbin, 79 KY. L.J. 864 (1990-91).

99. *See* Commonwealth v. Woods, 607 N.E.2d 1024, 1028-29 (Mass. 1993) (deciding that double jeopardy does not bar prosecution for negligent vehicular homicide after acquittal on drunken driving charges stemming from same crash); State v. Paris, 627 A.2d 582, 590 (N.H. 1993) (holding, based on prior decisions, that enhancing a criminal mischief conviction to a felony based on use of a firearm and subsequently convicting defendant for violating a firearm statute did not violate "same conduct" test based on legislative intent).

100. *See Dixon*, 113 S. Ct. at 2862-63.

101. *See* Hickey, *supra* note 22, at 30-31. A unified *Blockburger* approach would promote an alternative to the hypertechnical and fragmented approach to the double jeopardy analysis under *Grady*. *Id*; *see also* Craig J. Webre, Note, Grady v. Corbin, *Successive Prosecutions Must Survive Heightened Double Jeopardy Protection*, 36 LOYOLA L. REV. 1171, 1185 (1991) (arguing that simplicity and justice could have been achieved by retaining the traditional *Blockburger* test).

102. *Dixon*, 113 S. Ct. at 2889 (Souter, J., dissenting). Additionally, the fact that one court divided the *Grady* test into four separate clauses does not create enough confusion to justify ignoring stare decisis. *Id.*

103. *See* Albernaz v. United States, 450 U.S. 333, 343 (1970).

104. Oddly, in State v. Kipi, 811 P.2d 815, 821 (Haw. 1992), the court, referring to Scalia's apparently facetious warning to prosecutors to start acting as if a "same transaction" test were good law, held that the "same conduct" test barred a second prosecution. The court made no serious attempt to work through the "same conduct" test as it was described by the *Grady* majority.

105. *See Dixon*, 113 S. Ct. at 2863 n.16. Scalia quotes from judges expressing confusion in the following cases: United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), (no double jeopardy bar following conspiracy exception in *Felix*) *vacated and remanded*, 112 S. Ct. 1657; United

cantly clarified by *Felix*. The other cases Justice Scalia used to support his conclusion that the test was confusing were cases in which courts found no double jeopardy by interpreting *Grady* narrowly.[106] Thus, the decisions of lower court judges who were struggling to develop an application of *Grady* that addressed Justice Scalia's concerns about overprotection of double jeopardy interests were used as a rationale for rejecting the entire *Grady* framework.

An examination of the impact of *Grady* on the cases involving contempt of court illustrates how the Supreme Court could have developed a narrow "same conduct" jurisprudence instead of overruling *Grady* outright. Justice Scalia rejected the idea of creating an exception to *Grady* in the contempt area because the Court could not reasonably apply the "past practice" exception that it had used in *Felix*.[107] While failing to address why "past practice" is the only appropriate exception, Justice Scalia explained that the Court cannot apply it because the widespread use of contempt charges before charging the underlying crime is a relatively new phenomenon.[108] Ironically, this admission undercuts Scalia's argument that the appropriate standard for double jeopardy should be the standard existing at the time of the framing of the Constitution.

In fact, several lower courts created exceptions to *Grady* in the contempt area by holding that certain exigent circumstances justified a successive prosecution.[109] In *Commonwealth v. Aikins*,[110] the Superior Court of Pennsylvania held that a defendant's prior conviction of contempt for violating a "Protection From Abuse Order" did not preclude a subsequent burglary conviction arising from the same burglary.[111] The court reconciled the decision with *Grady* by using a broad definition of exigent circumstances.[112] The *Aikins* court ruled that the need to protect women and children and to curb domestic violence outweighed due process violations, because the potential victims might not survive the typi-

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States v. Prusan, 967 F.2d. 57 (2nd Cir. 1992), (double jeopardy bar to count of conspiracy reversed in light of *Felix*) *cert. denied*, 113 S. Ct. 497 (1992).

106. *See* Sharpton v. Turner, 964 F.2d 1284 (2d Cir. 1992) (finding no double jeopardy bar in successive prosecutions for fraud and tax evasion by analogizing case to *Felix*); United States v. Prusan, 780 F. Supp. 1431 (S.D.N.Y. 1991), *rev'd*, 967 F.2d. 57 (2nd Cir.), *cert. denied*, 113 S. Ct. 497 (1992) (finding no double jeopardy bar on three of the four counts in issue); Eatherton v. State, 810 P.2d 93 (Wyo. 1991) (finding no double jeopardy bar to successive prosecutions).

107. *See Dixon*, 113 S. Ct. at 2863 n.15.

108. *Id.* at 2863.

109. *See, e.g.*, Commonwealth v. Manney, 617 A.2d 817, 818 (Pa. Super. Ct. 1992).

110. 618 A.2d 992 (Pa. Super. Ct. 1993).

111. *Id.* at 993-96.

112. *Id.* at 994-95. "*Grady* could not make it more clear . . . that double jeopardy may not deny the right to prosecute the substantive offenses because procedural or administrative exigencies require more expeditious handling of the summary offense." *Id.* at 994.

cal one- to two-year wait for a trial.[113]

The "exigent circumstances" exception also solves the problem of the double jeopardy bar restricting the ability of a judge to maintain order in the courtroom when sanctions could preclude future prosecution.[114] In one pre-*Grady* case, the Illinois Supreme Court held that a non-adversarial summary criminal contempt proceeding, arising out of a courtroom scuffle in which the defendant punched the prosecutor, did not bar a successive prosecution for aggravated battery based on the same act.[115] By following a reasonable "exigent circumstances" exception to *Grady*, the lower courts could have maintained order in the courtroom and protected highly endangered potential victims without precluding a future prosecution.[116]

B. *Does* Dixon *Offer Sufficient Protection of Double Jeopardy Interests?*

The return to the *Blockburger* standard significantly reduces the rights of a defendant who is subject to multiple prosecutions. Under *Dixon-Blockburger*, the courts would define nine federal narcotics offenses as separate from each other.[117] This would allow the government to bring nine separate prosecutions for a single sale of narcotics.[118] Although a prosecutor is unlikely to prosecute nine times, two or three attempts by a persevering prosecutor is not out of the question.[119]

A fundamental error of the *Dixon* Court is its failure to address Justice Brennan's theory that double jeopardy interests are implicated at the outset of a trial, not merely when the verdict is returned.[120] Justice Souter accused the majority of "dismembering the protection against successive prosecution that the Constitution was meant to provide."[121] Although it is the Court's role to defer to legislative intent with regard to

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113. *Id.* at 995. Justice Blackmun advocated a similar approach in *Dixon*. *See Dixon*, 113 S. Ct. at 2879-80 (Blackmun, J., concurring in part and dissenting in part).

114. An area of confusion for some lower courts was that the term "contempt of court" encompasses both direct and indirect criminal contempt. Direct criminal contempt is used to maintain order in the courtroom, and indirect criminal contempt is used to enforce a court's long-term orders.

115. People v. Totten, 514 N.E.2d 959 (Ill. 1987).

116. The *Aikins* case, however, comes dangerously close to allowing the exception swallow the rule.

117. *See* Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 928 n.43 (1958).

118. If one trial resulted in an acquittal, however, the defendant might be able to invoke collateral estoppel.

119. *See* Thomas, *supra* note 53, at 199.

120. *See* Green v. United States, 355 U.S. 184, 188 (1957); *see also supra* notes 24-25 and accompanying text.

121. *Dixon*, 113 S. Ct. at 2881 (Souter, J., concurring in part and dissenting in part).

multiple punishments,[122] it is the judiciary's role to protect against successive prosecutions.[123] The *Dixon* decision allows the government to avoid the multiple prosecution bar by creating fine distinctions between laws prohibiting the same conduct, thus manipulating the definition of "offense."[124]

Justice Scalia asserted that collateral estoppel and lack of resources will dissuade prosecutors from bringing multiple prosecutions. Yet the recent limitations placed on collateral estoppel by *Dowling v. United States*[125] suggest that the rule will be applied only in rare situations. Also, his unsupported reliance on a lack of prosecutorial resources is mere wishful thinking.[126]

C. *What Double Jeopardy Protection Remains After* Dixon*?*

The *Dixon* decision reduces the constitutional prohibition against successive prosecutions to a minimum. In the post-*Dixon* case of *United States v. Liller*,[127] the Second Circuit Court of Appeals overturned a double jeopardy bar that was based on *Grady*.[128] The *Liller* court held that the double jeopardy clause did not bar the government from prosecuting a defendant for possession of a firearm by a felon despite his prior prosecution for knowingly transporting the same weapon in interstate commerce.[129] What would have been a close question under *Grady* was now considered "straightforward" by the court.[130] The court acknowledged that Justice Scalia's opinion in *Dixon* may require the court to look beyond a strict statutory comparison and examine the facts alleged in the indictments.[131] The *Liller* court held that the statutes were clearly distinct and, even if the court examined the facts, each charge required proof of a fact that the other did not.[132] This analysis suggests that lower courts will recognize the strong limitations placed on the double jeopardy bar, but will require successive prosecutions to prove a slightly different set of facts in order to retain a minimal judicial review

122. Missouri v. Hunter, 459 U.S. 359, 368 (1983).

123. *See* United States v. Ball, 163 U.S. 662, 669-70 (1896).

124. *See Dixon*, 113 S. Ct. at 2882 (Souter, J.).

125. 493 U.S. 342 (1990); *see supra* note 69.

126. *Dixon*, 113 S. Ct. at 2877 (White, J., dissenting).

127. 999 F.2d 61 (2d Cir. 1993).

128. *Id.* at 62.

129. *Id.*

130. *Id.* at 63.

131. *Id.* The court noted that, in *Dixon*, four or possibly five Justices examined the court order violated by the defendants rather than the more general statutory elements of the criminal contempt provision. *Id.*

132. *Id.* The new charge required proof that the defendant was a felon and the old charge required that the firearm was stolen and transported interstate. *Id.*

of the government's acts.[133]

Most, if not all, of the cases that failed the "same conduct" test would survive a double jeopardy challenge under *Dixon*. In one pre-*Dixon* case, a defendant was sentenced to a six-month jail term for criminal contempt based on his refusal to testify in a homicide investigation.[134] The State then charged him with two counts of hindering prosecution in the first degree, which the court dismissed based on the *Grady* test.[135] Despite the fact that these subsequent charges are based on exactly the same conduct, *Dixon* would allow them, based on either the lack of a contempt order in the second prosecution or the distinctions between the elements needed to prove a "refusal to testify" and "hindering prosecution."[136]

Justice Scalia narrowly expanded the *Blockburger* test to a "*Blockburger*-plus" approach by stating that, under *Harris v. Oklahoma*, the element of a violated contempt order is not considered an additional element to the underlying crime.[137] However, Scalia also narrowed the scope of *Harris* by making it possible for a defendant to be tried twice for the same offense as long as it is a lesser included offense. For example, a defendant may be acquitted of simple assault and then tried for assault with intent to kill, allowing the jury to return with a conviction of assault as a lesser included offense. Despite the extremely broad discretion this gives prosecutors, Justice Scalia asserted that this example "merely illustrates the unremarkable fact that one offense (simple assault) may be an included offense of two offenses (violation of the CPO for assault, and assault with intent to kill) that are separate offenses under *Blockburger*."[138]

Chief Justice Rehnquist, who offered an even narrower reading of *Harris*, asserted that Scalia was actually applying a "same conduct" analysis by going beyond a simple examination of statutes to compare the facts of specific contempt orders to the subsequent charges.[139] Using what Justice White termed a "hypertechnical and archaic approach,"[140]

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133. The Rehnquist bloc in *Dixon* would not support any analysis beyond a statutory comparison. *See Dixon*, 113 S. Ct. at 2865-68. It is unlikely that this view will secure a majority of the Court.

134. State v. Mojarro, 816 P.2d 260, 260 (Ariz. Ct. App. 1991).

135. *Id.* at 260-61.

136. If there are absolutely no distinctions between the elements or facts required, the second prosecution might be barred under the current standard.

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

138. *Id.* at 2859 n.7.

139. *Id.* at 2865-66. Scalia, who bitterly criticized the Court for arbitrarily interpreting the constitutional text in *Grady*, offers no support for his proposition that the condition of being on probation should not be considered a separate element under *Blockburger*.

140. *Id.* at 2877, (quoting from Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

the majority interpreted *Harris* as standing for the narrow proposition that no violation of double jeopardy occurs if there is any additional element added to a lesser offense in a subsequent prosecution. Although Foster's assault charge cannot be abstracted from the element of contempt for violating a court order not to commit assault, the majority asserted that assault with intent to kill is sufficiently distinct from the contempt conviction to avoid the double jeopardy bar.[141]

The Rehnquist bloc also narrowly interpreted *Harris* to stand for the idea that unless a statute specifically mentions a lesser crime, a court may not bar multiple prosecutions of greater and lesser offenses. For example, commission of a felony will necessarily fulfill an element of felony-murder, but the commission of an assault will not fulfill an element of a contempt statute unless that statute contains assault as an element of contempt.[142] Ultimately, Chief Justice Rehnquist interpreted *Harris* as standing at its core for the proposition that any felony is a lesser included offense of felony-murder and that examination beyond the statutory language is unnecessary.[143]

The Scalia-Rehnquist analysis is problematic in two areas. First, neither Justice explains how the Fifth Amendment prohibits successive prosecutions when a lesser crime is incorporated by statute into a greater crime, as in *Harris*, but allows successive prosecutions when the greater crime does not specifically mention the lesser crime. Under this analysis, *Blockburger* is purely a test of statutory construction. This allows the legislature to create and prosecute as many variations of an offense as it wishes.

Second, Justice Scalia's claim that the Framers never meant to extend double jeopardy beyond a comparison of statutes is dubious.[144] At the time of the framing of the Constitution, there were far fewer statutes, so that "same offense" was the equivalent of "same culpability."[145] The "same conduct" test merely reasserts the protection that defendants were always meant to have: being prosecuted only once for each illegal act.

V. CONCLUSION

The *Dixon* decision is a retreat from the judiciary's role as protector of individual rights against potential abuses of power by the legislature. Twenty-five years ago, Justice Stewart wrote that the extraordinary

141. *Dixon*, 113 S. Ct. at 2859.
142. *Id.* at 2867.
143. *See supra* text accompanying notes 38-39.
144. *See Grady*, 495 U.S. at 527-36 (Scalia, J., dissenting).
145. *See* Thomas, *supra* note 53, at 207.

proliferation of overlapping and related criminal statutes required the Court to look beyond statutory comparisons to define "same offense" in a way that reflected reality.[146] The trend toward overlapping and highly technical new offenses has increased since then. *Grady* was a reasonably coherent attempt to breathe life into a Fifth Amendment right by reasserting the judiciary's role as the interpreter of what constitutes a "same offense." *Dixon* allows legislatures to create constitutionally distinct offenses by adding a minor element to a crime without changing the nature of the act.

As a matter of constitutional theory, *Dixon* is both premature and unsound. The majority's cavalier approach to stare decisis is not justified by the greater simplicity of the *Blockburger* test. Additionally, the *Dixon* Court's fractured holding creates the problem of conflicting interpretations by lower courts.

In the future, the Court may explore alternative expansions of double jeopardy protection.[147] Possible tests include a "same transaction" test, which is easier to apply than the "same conduct" test and gives defendants broad protection against successive prosecutions. An innovative alternative is the "life or limb" test, which limits the application of the "same transaction" test to "grave" offenses that allow for incarceration.[148] This may have broader appeal to the Court because it avoids some unjust results stemming from greater protection such as the dismissal of the vehicular homicide count in *Vitale*.[149]

The future of double jeopardy protection rests precariously with the swing votes on the Court. Because four Justices supported the expansive protection of *Grady* and three supported complete deference to the legislature, the future definition of "same offense" lies in the hands of Justice Scalia's "*Blockburger*-plus" approach. That approach is far closer to the Rehnquist bloc than it is to the pro-*Grady* dissenters. This suggests that only a minimal degree of scrutiny will be applied to future successive prosecutions. The *Dixon* decision is a small step forward for a uniform double jeopardy standard but a large step backward for judicial enforcement of Fifth Amendment rights.

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146. *See* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970).

147. Although its advantages outweighed its problems, the *Grady* test rested on shaky ground from the start. If the *Grady* Court had elaborated on the structure and goals of the test rather than justifying it mainly through an attack on *Blockburger*, the test would have been less vulnerable.

148. This test was developed by Professor George C. Thomas III. *See* Thomas, *supra* note 53, at 217-18.

149. *See* Illinois v. Vitale, 447 U.S. 410, 419-20 (1980).