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UNFOLDING THE LAW OF DOUBLE JEOPARDY

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I. INTRODUCTION

[T]he decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.[1]

The decisional law of double jeopardy has become even more entangled than it was a dozen years ago when then Justice Rehnquist penned his metaphor.[2] The language of the Double Jeopardy Clause is straightforward

1. Albernaz v. United States, 450 U.S. 333, 343 (1981).

2. For example, at the end of the October 1992 term, by a vote of five-to-four, the Court overturned the three-year-old same-conduct test for determining whether two offenses are really the same offense for double jeopardy purposes. United States v. Dixon, 113 S. Ct. 2849 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990)). Yet, when the *Dixon* Court applied the earlier same-elements test for same offense, the majority split three-to-two, with Chief Justice Rehnquist accusing the two of using an

enough: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[3] Yet, as is true of other clauses of the Constitution,[4] the details of its component parts can be numbingly complex. Even apparently simple inquiries, such as what is an acquittal, a conviction, or the same offense, yield no simple responses.

Some of the difficulty may be avoided, however, by focusing carefully on the precise issue presented in any particular case. For example, the answer to whether one offense is the same as another may depend in part on whether the question is asked in the context of successive prosecutions or in the context of multiple sentences for related charges in a single prosecution. Cases crucial to determining the issue in the former setting[5] may be irrelevant in the latter, and vice versa.[6]

Article I, Section 12 of the South Carolina Constitution closely tracks the language of the Fifth Amendment's Double Jeopardy Clause: "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."[7] The only noteworthy differences between the two clauses are the absence of a reference to liberty in the Fifth Amendment version and the absence of a reference to jeopardy of limb in South Carolina's version.[8]

Because the Fifth Amendment's Double Jeopardy Clause was not applicable to the states until 1969,[9] state constitutional provisions, statutes,

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analysis strikingly similar to that of the overturned same-conduct test. *Id.* at 2867 (Rehnquist, C.J., concurring in part and dissenting in part). *See infra* notes 387-397 and accompanying text.

3. U.S. CONST. amend. V.

4. For example, the ten words of the Free Speech Clause, U.S. CONST. amend. I, require 300 to 400 pages of explication in a standard introductory constitutional law casebook. *See, e.g.,* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW (9th ed. 1993).

5. *See infra* notes 324-348 and accompanying text (discussing Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993)).

6. *See infra* notes 286-289 and accompanying text (discussing Missouri v. Hunter, 459 U.S. 359 (1983)).

7. S.C. CONST. art. I, § 12.

8. This is an interesting omission given that at least some mutilation, such as cropping ears, was an authorized punishment in slave courts in colonial times. *See* WILLIAM R. SMITH, SOUTH CAROLINA AS A ROYAL PROVINCE 143 (1970). South Carolina's double jeopardy clause first appeared in the Constitution of 1868 as Article I, Section 18. S.C. CONST. of 1868, art. I, § 18. Currently, the South Carolina Constitution explicitly proscribes corporal, as well as cruel or unusual, punishment. S.C. CONST. art. I, § 15.

9. Benton v. Maryland, 395 U.S. 784 (1969). The applicability of the selective incorporation doctrine to double jeopardy is discussed *infra* notes 37-38 and accompanying text.

and common law provided the bulk of the protection from double jeopardy for most of the country's history. While many of the post-1969 South Carolina double jeopardy cases appear to rely exclusively on federal law,[10] others continue to reflect the importance of local provisions.[11] As in any other area of criminal procedure, knowledge of state law is crucial to understanding the protection from double jeopardy.

The purpose of this Article is to facilitate understanding by providing as clear as possible a chart through the difficult waters of double jeopardy. The author dissects the pertinent issues, not with the detail of a treatise,[12] but with an eye toward simple explication. Although the emphasis of this Article is on federal law, the analysis is complemented, where appropriate, by discussion of local provisions.

II. THE SCOPE OF PROTECTION FROM DOUBLE JEOPARDY

A. History and Policies

Despite at least one court's assertion to the contrary,[13] the history of the protection from double jeopardy cannot be traced to the Magna Charta, the English Bill of Rights of 1689, nor any English statute prior to 1791.[14] While the origin of double jeopardy protection might be found in early Roman or canon law,[15] and it may have appeared in embryonic form in England in the fourteenth century,[16] by the seventeenth century the basic modern rule against double jeopardy was well established and encompassed within the common-law pleas of *autrefois acquit*, *autrefois convict*, *autrefois attaint* (literally, other times acquitted, convicted, or attainted—*i.e.*, had one's goods declared forfeited), and former pardon.[17] The basic English

10. *E.g.*, Matthews v. State, 300 S.C. 238, 387 S.E.2d 258 (1990), *discussed infra* notes 284-285 and accompanying text.

11. *E.g.*, State v. Clarke, 302 S.C. 423, 396 S.E.2d 827 (1990), *discussed infra* notes 443-444 and accompanying text.

12. The author is unaware of a treatise on double jeopardy. The subject is explored in some detail in 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE ch. 24 (1985). For discussion of history and policy issues, see JAY A. SIGLER, DOUBLE JEOPARDY (1969). LEONARD G. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM (1968), critiques only the dual sovereignty cases. Recent federal cases on a range of double jeopardy issues are discussed in Laura P. Clauson et al., Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1990-1991,* 80 GEO. L.J. 939, 1294-1340 (1992).

13. State v. Felch, 105 A. 23, 26 (Vt. 1918) (cited in SIGLER, *supra* note 12, at 4).

14. SIGLER, *supra* note 12, at 4.

15. *Id.* at 3-4.

16. *Id.* at 10.

17. *Id.* at 18-19. Some early twentieth-century cases distinguished, and entertained,

common-law protections were well known to colonial lawyers through Coke's *Institutes*[18] and Blackstone's *Commentaries*.[19]

The general circumstances surrounding the adoption of the Bill of Rights have been explored in great detail,[20] and the antecedents of some of its more celebrated provisions, such as the Establishment Clause,[21] are well known.[22] However, the pedigree of the Double Jeopardy Clause is more obscure.

Colonial legislative protection from double jeopardy first appeared in the Massachusetts Body of Liberties of 1641: "No man shall be twise sentenced by Civil Justice for one and the same Crime, offence, or Trespasse."[23] The Massachusetts law, which served as a model for other colonies, represented a substantial expansion of the scope of protection available under English common law. In the colonies, all crimes, not just capital felonies, were covered.[24] Although protection from double jeopardy was recognized in the law of the colonies, only two state constitutions had double jeopardy provisions when the Bill of Rights was adopted.[25]

Both Mr. Justice Frankfurter, dissenting in *Green v. United States*,[26] and Professor Sigler trace the sketchy history of the Double Jeopardy Clause's precise language from Madison's original proposal to its final

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separate pleas for *autrefois acquit* and former jeopardy. *E.g.*, State v. Gowan, 178 S.C. 78, 80-82, 182 S.E. 159, 160-61 (1935). Although the common-law pleas are still available, a claim of double jeopardy pursuant to federal and state constitutional provisions covers the issues raised in the common-law pleas. Modern practice seems to rely only on constitutional claims. *E.g.*, State v. Magazine, 302 S.C. 55, 393 S.E.2d 385 (1990). Unfortunately, *Magazine* is also an example of another common practice, which is to ignore the state constitution.

18. EDWARDO COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 213-14 (1648).

19. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335-37 (13th ed. 1880). The influence of this passage in Blackstone on those who adopted the Constitution is noted in Green v. United States, 355 U.S. 184, 187 (1957).

20. *See, e.g.*, ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS (1955).

21. U.S. CONST. amend. I.

22. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 11-13 (1947).

23. THE COLONIAL LAWS OF MASSACHUSETTS 43 (William H. Whitmore ed., 1889).

24. SIGLER, *supra* note 12, at 21-22.

25. *Id.* at 23-27. The first provision, enacted in New Hampshire, was limited to instances of prior acquittal: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." N.H. CONST. art. I, § XVI, *quoted in* SIGLER, *supra* note 12, at 23. The Pennsylvania Declaration of Rights of 1790 used language virtually identical to the Fifth Amendment, which was adopted the following year: "No person shall, for the same offence, be twice put in jeopardy of life or limb." PA. CONST. art. IX, § 10, *quoted in* SIGLER, *supra* note 12, at 23.

26. Green v. United States, 355 U.S. 184, 201-02 (1957) (Frankfurter, J., dissenting).

form. Little contemporaneous evidence of the Clause's intended meaning exists other than the statement that the Double Jeopardy Clause was intended to be "declaratory of the law as it now stood,"[27] referring to the "universal practice in Great Britain and in this country."[28] However, the language chosen by the Framers quite clearly suggests a broader scope for the protection than that which prevailed in Great Britain. The language of the Fifth Amendment, like that of the Massachusetts Body of Liberty,[29] is not limited to capital felonies; nor is it limited to instances in which the accused had been previously acquitted or convicted—limitations inherent in the common-law pleas of *autrefois acquit* and *autrefois convict*.[30]

The record of the Supreme Court's interpretation of the Double Jeopardy Clause is much more accessible than the history of the Clause's origin. According to *United States v. DiFrancesco*[31] the Clause's guarantee consists "'of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'"[32] Furthermore, as a fourth guarantee, "the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'"[33]

The basic rationale for the Double Jeopardy Clause, and particularly for proscribing reprosecution following acquittal, 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."[34]

When the Bill of Rights was adopted in 1791, it was considered a necessary limitation on the powers of the newly created federal government, but was not applicable to actions of the states or their political subdivi-

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27. 1 ANNALS OF CONGRESS 753 (Joseph Gales ed., 1789).

28. *Id.*

29. THE COLONIAL LAWS OF MASSACHUSETTS, *supra* note 23, at 43.

30. Because the Fifth Amendment's language does not limit its applicability to prior convictions or acquittals, the Double Jeopardy Clause is applicable to trials following mistrials. *See infra* Part VI.

31. 449 U.S. 117, 126-38 (1980).

32. *Id.* at 129 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

33. *Id.* at 128 (quoting Arizona v. Washington, 434 U.S. 497, 503 (1978) (citations omitted)).

34. *Id.* at 127-28 (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

sions.[35] With the adoption of the Fourteenth Amendment in 1868, however, the states subjected their judicial proceedings to federal scrutiny for compliance with the federal Due Process Clause. In the half century from 1920 to 1970, most of the specific provisions of the Bill of Rights were held to be essential to due process and were incorporated via the Fourteenth Amendment to be applicable to the states.[36]

The Double Jeopardy Clause was a latecomer to the process of selective incorporation, not made applicable to the states until the 1969 case of *Benton v. Maryland*.[37] In *Benton* the Court stated that the Fifth Amendment's protection against double jeopardy was "fundamental to the American scheme of justice."[38]

By that date, South Carolina had provided similar protection in its constitution for over a century, and in its common law for a much longer time.[39] The South Carolina Constitution of 1868 provided: "No person, after having been once acquitted by a jury, shall again, for the same offense, be put in jeopardy of his life or liberty."[40] Although this clause of the South Carolina Constitution expanded the common-law double jeopardy protection from capital offenses to all offenses,[41] it retained the limitation

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35. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

36. The selective incorporation doctrine represents a compromise between Justice Black's position that the Due Process Clause totally incorporates the Bill of Rights, and Justice Frankfurter's opposite view that the Due Process Clause does not incorporate the Bill of Rights at all. The history and controversy about the doctrine is summarized in Justice Black's concurring opinion in Duncan v. Louisiana, 391 U.S. 145, 162-71 (1968) (Black, J., concurring), and in Justice Harlan's dissenting opinion, *id.* at 171-93 (Harlan, J., dissenting).

37. 395 U.S. 784 (1969). *Benton* overruled Palko v. Connecticut, 302 U.S. 319 (1937).

38. *Benton*, 395 U.S. at 796. The Court's thumbnail sketch of the history of double jeopardy law, *id.* at 795, relied heavily on SIGLER, *supra* note 12, which was published the same year, 1969.

On one occasion three members of the Court suggested that not every aspect of Fifth Amendment double jeopardy law is applicable to the states. Crist v. Bretz, 437 U.S. 28, 40 (1978) (Powell, J., dissenting).

39. *See* S.C. CODE ANN. § 14-1-50 (Law. Co-op. 1976) ("All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section."). This section can be traced to the early eighteenth century. Act of Dec. 12, 1712, No. 322, § 5, 2 S.C. Stat. 401, 413-14 (1837). One of the earliest reported common-law cases, State v. Wright, 7 S.C.L. (2 Tread.) 517 (1814), concluded that the protection against double jeopardy precluded a new trial for one acquitted of a misdemeanor, even though contrary to the evidence. *Id.* at 519.

40. S.C. CONST. of 1868, art. I, § 18.

41. The applicability to misdemeanors of the common-law rule against retrial after

on the protection to instances in which the accused had been previously acquitted.[42] The limitation to acquittals disappeared with the constitution of 1895: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or liberty."[43] The language was slightly modified in 1971 to its present form: "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."[44]

South Carolina double jeopardy cases prior to *Benton v. Maryland* necessarily applied only state constitutional, statutory, and common-law provisions. However, the state's courts often looked to decisions of the United States Supreme Court for guidance in developing the common law.[45] Post-*Benton* South Carolina cases typically cite both state and federal constitutional provisions, but discuss the double jeopardy issue without distinguishing state law from federal law.[46] There is no inherent reason why South Carolina's double jeopardy clause should have the same meaning as the Fifth Amendment's, but since *Benton* the South Carolina courts have never interpreted the state provision independently of its federal counterpart.[47]

B. When Jeopardy Attaches and Terminates, and Continuing Jeopardy

Not all double jeopardy issues are complicated. Some are quite straightforward, such as those concerning the beginning (though perhaps not the termination) of jeopardy. In a jury trial, jeopardy attaches when the jury

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acquittal had been settled in South Carolina for more than half a century by the time the state constitution was adopted. *See Wright*, 7 S.C.L. (2 Tread.) at 519.

42. This limitation was similar to that in the New Hampshire Constitution of 1784, *see supra* note 25.

43. S.C. CONST. of 1895, art. I, § 17 (current version at S.C. CONST. art. I, § 12).

44. S.C. CONST. art. I, § 12.

45. *See, e.g.*, State v. Gathers, 15 S.C. 370, 371-72 (1881) (citing U.S. CONST. amend. V; *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); and South Carolina and British precedent).

46. *See, e.g.*, Kelly v. State, 274 S.C. 613, 266 S.E.2d 417 (1980). Sometimes South Carolina cases simply refer to the "double jeopardy clause" without specifying either state or federal constitution. *See, e.g.*, State v. Magazine, 302 S.C. 55, 57, 393 S.E.2d 385, 386 (1990).

47. Research reveals 51 reported South Carolina cases since *Benton* that mention double or former jeopardy, beginning with State v. Hill, 254 S.C. 321, 175 S.E.2d 227 (1970). Cases that explicitly refer to South Carolina's double jeopardy clause in the main opinion are: State v. Dobson, 279 S.C. 551, 309 S.E.2d 752 (1983); State v. Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983); State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983); Kelly v. State, 274 S.C. 613, 266 S.E.2d 417 (1980); and State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977).

is sworn.[48] In a bench trial, jeopardy attaches when the first witness is sworn.[49] And, in a case resolved by a guilty plea, jeopardy attaches when the plea is accepted.[50] Jeopardy attaches in juvenile delinquency adjudications when the court begins to hear the evidence.[51]

Whether jeopardy has attached is significant because events occurring before that time, such as dismissal of the indictment, will not preclude a subsequent proceeding.[52] After jeopardy has attached, however, dismissal of the indictment or a failure to prosecute a charge will preclude future prosecution.[53] Mistrials declared after jeopardy has attached may or may not preclude subsequent prosecution.[54] This aspect of double jeopardy jurisprudence represents a substantial departure from the traditional, and current, British rule that only a prior acquittal or conviction precludes subsequent prosecution.[55]

In *United States v. Ball*[56] the Supreme Court acknowledged the validity of the traditional British rule that jeopardy does not attach if the trial court lacks jurisdiction to try the case.[57] However, the Court concluded that a fatally defective indictment does not deprive a court of jurisdiction in the requisite sense; therefore, an acquittal on that indictment will preclude subsequent prosecution as long as "the court had jurisdiction of the cause and of the party."[58]

Repeated references to jurisdiction in the later double jeopardy case of *Kepner v. United States*[59] suggest that jeopardy will attach as long as the court is competent to try the accused and the crime.[60] Conversely, a recent

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48. *E.g.*, Crist v. Bretz, 437 U.S. 28, 35-36 (1978) (citing Downum v. United States, 372 U.S. 734 (1963)); State v. Rogers, 263 S.C. 373, 383, 210 S.E.2d 604, 609 (1974); State v. Charles, 183 S.C. 188, 193-94, 190 S.E. 466, 468 (1937).

49. *E.g.*, Serfass v. United States, 420 U.S. 377 (1975).

50. *E.g.*, United States v. Bullock, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978).

51. Breed v. Jones, 421 U.S. 519, 531 (1975).

52. *See Serfass*, 420 U.S. at 389.

53. *See* Kelly v. State, 274 S.C. 613, 266 S.E.2d 417 (1980). The solicitor in *Kelly* prosecuted only one charge in a three-count indictment, but, because jeopardy attached to the entire indictment when the jury was sworn, the other charges could not be pursued in a subsequent proceeding. However, not every dismissal after jeopardy has attached necessarily precludes subsequent proceedings. *See infra* notes 180-183 and accompanying text.

54. *See* discussion *infra* part VI.A.

55. *See* SIGLER, *supra* note 12, at 126-28.

56. 163 U.S. 662 (1896).

57. *Id.* at 669.

58. *Id.* at 669-70.

59. 195 U.S. 100 (1904).

60. *Id.* at 133. For example, until July 9, 1992 a magistrate's court in South Carolina

lower court case suggests that a fatally defective indictment might deprive a court of jurisdiction to the extent that jeopardy would not attach in its proceedings.[61]

The termination of jeopardy is a more complex issue than the attachment of jeopardy. The concept of "continuing jeopardy" permits reprosecution if jeopardy has not been terminated in the first trial by acquittal or conviction.[62] For example, "the failure of the jury to reach a verdict is not an event which terminates jeopardy."[63] Consequently, a subsequent prosecution on that indictment does not implicate double jeopardy; it is simply a continuation of the original jeopardy. On the other hand, a mistrial declared over the defendant's objection will terminate jeopardy unless the mistrial was required by manifest necessity.[64]

In *State v. Gamble*[65] the South Carolina Supreme Court used some confusing language in correctly concluding that a mistrial granted for manifest necessity does not preclude reprosecution. Instead of referring to continuing jeopardy, the *Gamble* court observed that "jeopardy did not attach in the first trial because the mistrial was the result of manifest necessity."[66] Actually, jeopardy attached once the jury was sworn,[67] but was not terminated by the mistrial declared for manifest necessity. Therefore, the original jeopardy continued through the subsequent prosecution.

The concept of continuing jeopardy has proved important in the trial de novo system of appeal. For example, in *Justices of Boston Municipal Court v. Lydon*[68] the court examined the trial de novo system of Boston, Massachusetts. Under this system, a person facing certain minor charges in Boston may first seek a bench trial in municipal court and then, if convicted, seek a jury trial de novo as of right.[69] A trial de novo without judicial consideration that the prior bench trial conviction should be reversed for a

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was not competent to try a criminal offense with a possible punishment greater than 30-days incarceration or a $200.00 fine. S.C. CODE ANN. § 22-3-545 and -550 (Law. Co-op. 1989 & Supp. 1992).

61. Schlang v. Heard, 691 F.2d 796 (5th Cir. 1982), *cert. denied*, 461 U.S. 951 (1983).

62. Richardson v. United States, 468 U.S. 317, 325-26 (1984).

63. *Id.* at 325.

64. *See infra* part VI.C.

65. 275 S.C. 492, 272 S.E.2d 796 (1980) (concluding that manifest necessity was established because of discovery of biased jurors after the State had begun to present its case).

66. *Id.* at 494, 272 S.E.2d at 797.

67. *See supra* text accompanying note 48.

68. 466 U.S. 294 (1984).

69. *Id.* at 297.

lack of sufficient evidence[70] does not violate the Double Jeopardy Clause. In *Lydon* jeopardy did not terminate at the conclusion of the first trial, but continued through the trial de novo.[71]

More importantly, continuing jeopardy is now understood to allow a retrial after reversal of a conviction on appeal or pursuant to collateral relief.[72]

C. Proceedings to Which Double Jeopardy Applies

The language of the Fifth Amendment, "twice put in jeopardy of life or limb,"[73] suggests that protection from double jeopardy is limited to crimes carrying capital or corporal punishment. However, the Court in *Ex parte Lange*[74] concluded that the protection extends to all criminal offenses. The Court placed significance on the fact that the common-law pleas of *autrefois acquit* and *autrefois convict* had been made applicable to misdemeanors as well as to capital felonies.[75]

Early in the eighteenth century the South Carolina Supreme Court concluded that the common-law protection against double jeopardy extended to misdemeanors as well as to felonies.[76] The double jeopardy clause in the South Carolina Constitution of 1868[77] was similarly interpreted.[78]

In *Breed v. Jones*[79] the Court recognized that the protection against double jeopardy also extends beyond felonies and misdemeanors to apply in juvenile delinquency adjudications, even if labeled "civil."[80] The risks involved in juvenile delinquency determinations, including stigma and loss of liberty, are sufficiently similar to the risks involved in traditional criminal

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70. The Court had previously held that the Double Jeopardy Clause precludes a subsequent trial when a reviewing court reverses a previous conviction on the same charge because of insufficient evidence. *See* Burks v. United States, 437 U.S. 1 (1978), *discussed infra* notes 247-252 and accompanying text.

71. *Lydon*, 466 U.S. at 309-10.

72. *See* Price v. Georgia, 398 U.S. 323, 329 (1970) (commenting on the rule in United States v. Ball, 163 U.S. 662 (1896), that retrial following reversal of a conviction is not double jeopardy). The *Ball* rule is discussed *infra* text accompanying note 242.

73. U.S. CONST. amend. V.

74. 85 U.S. (18 Wall.) 163 (1873).

75. *Id.* at 169.

76. State v. Wright, 7 S.C.L. (2 Tread.) 517 (1814). The offense in *Wright* was minor: "Indictment for nuisances, by intruding on the streets of York Village, and building piazzas in front of their dwelling houses." *Id.* at 517.

77. S.C. CONST. of 1868, art. I, § 18.

78. State v. Gathers, 15 S.C. 370 (1881).

79. 421 U.S. 519 (1975).

80. *Id.* at 529.

proceedings to warrant protection from double jeopardy.[81] Jeopardy does not attach, however, at a juvenile certification procedure in which the court determines only whether the defendant should be tried as a juvenile or an adult, not whether the juvenile should be adjudicated delinquent.[82]

Other adjudications involving stigma and loss of liberty are not deemed to expose a defendant to jeopardy in the Fifth Amendment sense. Revocation of probation or parole because of alleged commission of a criminal offense does not trigger the protection from double jeopardy because the revocation is administrative rather than criminal in nature.[83] Thus, reliance on *Breed v. Jones* in this instance would be misplaced. Similarly, a prison disciplinary action would not preclude a subsequent criminal action based on the same conduct.[84]

Forfeiture proceedings and civil fines following criminal prosecutions can raise troublesome double jeopardy issues. In *One Lot Emerald Cut Stones v. United States*[85] the Court concluded that statutory forfeiture provisions, which are neither unreasonable nor excessive, in aid of the tariff laws are remedial rather than punitive.[86] Consequently, forfeiture provisions that apply to acts of importation without a customs declaration were not forbidden by the Double Jeopardy Clause, even though the forfeiture followed an acquittal on criminal charges for the same act of importation.[87] "'Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.'"[88]

The difficulty lies in determining whether a sanction labeled "civil" is

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81. *Id.* at 530-31.

82. Guam v. Fejeran, 687 F.2d 302, 303 (9th Cir. 1982), *cert. denied*, 460 U.S. 1045 (1983). According to Guam law, a certification hearing is distinct from an adjudicatory hearing. When, at the certification hearing, the juvenile court elects to retain jurisdiction over the juvenile, a separate hearing is required to determine delinquency. *Id.* at 304.

83. *E.g.*, United States v. Miller, 797 F.2d 336 (6th Cir. 1986) (probation); United States *ex rel.* Carrasquillo v. Thomas, 677 F.2d 225 (2d Cir. 1982) (parole).

84. Pruitt v. State, 274 S.C. 565, 570, 266 S.E.2d 779, 781 (dictum), *cert. denied*, 449 U.S. 1036 (1980). Also, a prison disciplinary proceeding against an inmate that could result in forfeiture of early release credits does not expose the inmate to jeopardy. United States v. Rising, 867 F.2d 1255 (10th Cir. 1989); *see* Clauson, *supra* note 12, at 1297 n.1441.

85. 409 U.S. 232 (1972).

86. *Id.* at 237.

87. *Id.*

88. *Id.* at 235-36 (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

truly civil or criminal. In *United States v. Halper*[89] a unanimous Court concluded that, because the imposed civil penalties were clearly punitive rather than remedial, the penalties were proscribed by the Double Jeopardy Clause. The defendant in *Halper*, previously convicted of Medicare fraud on sixty-five false claims amounting to $585.00, had been fined $5000.00 and sentenced to two years imprisonment. Subsequently, the government sought a civil penalty of $130,000.00, a statutorily set fine of $2000.00 for each of the sixty-five false claims, even though the false claims involved only $9.00 each.[90] The Court concluded that the penalties served the punitive aims of retribution or deterrence rather than the remedial aim of making the government whole.[91] The Court acknowledged, however, that the Double Jeopardy Clause would not preclude the government from seeking both full civil and criminal penalties in a single proceeding.[92]

The Court had previously considered whether contempt sanctions were civil or criminal in *Hicks ex rel. Feiock v. Feiock*.[93] The determination between civil and criminal contempt depends upon the character of the sanction actually imposed rather than the underlying purpose of the contempt proceeding.[94] The *Feiock* Court determined that contempt sanctions of fine or imprisonment are remedial and civil if designed to aid the complainant—*i.e.*, if the fine goes to the complainant and if incarceration would cease upon compliance with the court's order. On the other hand, the sanctions are punitive and criminal if designed to vindicate the authority of the courts—*i.e.*, if the fine is paid to the court and the incarceration is for a definite period.[95]

In *State v. Magazine*[96] the South Carolina Supreme Court relied on *Halper* and *Feiock* to conclude that a prior contempt citation was criminal in nature, thus precluding a subsequent criminal prosecution for the same act.[97] The defendant in *Magazine* was convicted of assault and battery of a high and aggravated nature. He had previously been held in contempt of a family court's protection order for the same assault and sanctioned with a year's imprisonment, suspended upon the payment of a $1500.00 fine. The court concluded that the sanction was criminal in nature because the

89. 490 U.S. 435 (1989).
90. *Id.* at 437-38.
91. *Id.* at 448-49.
92. *Id.* at 450.
93. 485 U.S. 624 (1988). The Double Jeopardy Clause was not at issue in *Feiock*.
94. *Id.* at 631-33.
95. *Id.* at 631-32.
96. 302 S.C. 55, 393 S.E.2d 385 (1990).
97. *Id.* at 57-58, 393 S.E.2d at 386-87.

defendant could not purge the contempt sanction by complying with the protection order.[98]

In *United States v. Dixon*,[99] a significant case decided at the end of the October 1992 term, the United States Supreme Court held that the protection of the Double Jeopardy Clause is applicable to criminal contempt proceedings, at least to those of the non-summary variety.[100] Eight justices agreed with this conclusion.[101]

D. Dual Sovereignty Doctrine

"The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two

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98. *Id.* at 58, 393 S.E.2d at 386.

99. 113 S. Ct. 2849 (1993). *Dixon*'s primary significance lies in the Court's overruling Grady v. Corbin, 495 U.S. 508 (1990), which had established the "same-conduct" test for determining whether two offenses are the same for double jeopardy purposes. *See* discussion *infra* part V.B.

100. *Dixon*, 113 S. Ct. at 2856. Summary contempt proceedings impose sanctions for disruption of judicial process. *See* State v. Yancy, 4 N.C. 133 (1814). Non-summary criminal contempt proceedings seek to vindicate the court's authority by sanctioning failure to comply with its orders. *See* Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624 (1988). The *Dixon* Court noted that it was not deciding whether the protection from double jeopardy applies to summary contempt proceedings. *Dixon*, 113 S. Ct. at 2856 n.1. Only Justice Blackmun, who would not apply the Double Jeopardy Clause to any contempt proceeding, failed to see a relevant distinction between summary and non-summary contempt proceedings. *Id.* at 2880-81 (Blackmun, J., concurring in the judgment in part and dissenting in part).

101. Justice Scalia's majority opinion on this point (Part II of the opinion) was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. *Dixon*, 113 S. Ct. at 2853. Justice White also agreed, joined on this point by Justices Stevens and Souter. *Id.* at 2868-69 (White, J., concurring in the judgment in part and dissenting in part).

Justice White characterized the majority's treatment of the issue as conclusory and responded in some detail to the government's arguments. He first rejected the argument from precedent as not supported. *Id.* at 2869-70. He found more powerful the government's argument that injuries to two different interests are at stake: a court's interest in preserving its authority, via a contempt proceeding, and the public's interest in being free from harm, served through enforcement of the criminal law. Nonetheless, he concluded that serving the two interests does not justify ignoring the core Double Jeopardy Clause protection against successive prosecutions. *Id.* at 2870-72. Finally, he rejected the contention that finding double jeopardy protection in a criminal contempt proceeding would have grave practical consequences. Instead, he suggested that the two different interests could be served by prosecuting the contempt charge and the criminal law violation in a single proceeding. *Id.* at 2872-73.

sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'"[102] If two governmental entities, seeking successively to prosecute an individual for the same act, draw their authority to punish from distinct sources of power, then they are separate sovereigns. Therefore, their successive prosecutions for the same act do not violate the Double Jeopardy Clause.[103] Consequently, both the federal and state governments may prosecute a defendant for the same act,[104] regardless of which prosecutes first,[105] as may two separate states,[106] without offending the Fifth Amendment. A Native American nation or tribe and the federal government are also separate sovereigns for purposes of this doctrine.[107]

A state and one of its political subdivisions are not, however, separate sovereigns. Thus, successive prosecutions for the same act by these governmental units would violate double jeopardy,[108] as would successive prosecutions by two or more political subdivisions of a single state.[109]

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102. Heath v. Alabama, 474 U.S. 82, 88 (1985) (citing United States v. Lanza, 260 U.S. 377, 382 (1922)). The dual sovereignty doctrine is critiqued in MILLER, *supra* note 12.

103. *Heath*, 474 U.S. at 88.

104. Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922). The dual sovereignty doctrine contains a certain irony. The doctrine of selective incorporation, which makes the Double Jeopardy Clause applicable to the states, *see supra* notes 36-38 and accompanying text, depends upon the rationale that by enacting the Fourteenth Amendment the states surrendered a part of their sovereignty to the federal government. Yet, the dual sovereignty doctrine maintains that both the states and the federal government, bound by the same Double Jeopardy Clause because of their shared sovereignty, are separate sovereigns for purposes of assessing possible violations of the Clause. Post-*Benton* dual sovereignty cases appear untroubled by this irony. *See, e.g.*, *Heath*, 474 U.S. at 82.

105. In both *Lanza* and *Abbate* the state prosecution preceded the federal one. In Bartkus v. Illinois, 359 U.S. 121 (1959), a companion case to *Abbate*, the state prosecution followed acquittal on federal charges for the same act.

106. *Heath*, 474 U.S. at 89. Conspiracy cases aside, there are probably few instances in which two states would have jurisdiction to prosecute for the same act. Any state in which an overt act pursuant to a conspiracy takes place has jurisdiction to prosecute that conspiracy. *See* State v. McAdams, 167 S.C. 405, 166 S.E. 405 (1932); WILLIAM S. MCANINCH & W.G. FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 347 (2d ed. 1989). In *Heath* the murder victim was kidnapped in Alabama and found dead in Georgia. The defendant was prosecuted for murder in both states. *Heath*, 474 U.S. at 83-85. *Heath* is critiqued in Ronald J. Allen & John P. Ratnaswamy, Heath v. Alabama: *A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801 (1985).

107. United States v. Wheeler, 435 U.S. 313, 328-30 (1978).

108. Waller v. Florida, 397 U.S. 387 (1970); *see* State v. Carter, 291 S.C. 385, 353 S.E.2d 875 (1987).

109. *See* Brown v. Ohio, 432 U.S. 161 (1977). Section 17-23-20 of the South Carolina

Even though a state and its political subdivisions are not separate sovereigns, two situations exist in which each might prosecute for the same act without implicating double jeopardy. First, a local prosecution would not bar a subsequent state prosecution for a harm not fully consummated at the time of the former prosecution. Thus, a local conviction for assault before the victim died would not preclude a subsequent state homicide prosecution.[110] Second, a defendant cannot avoid more serious state charges by procuring a municipal conviction through collusion between the defendant and local authorities.[111]

While successive prosecutions for the same act by separate sovereigns do not violate the Double Jeopardy Clause, there are three constraints on such prosecutions. One, known as the *Petite* policy, first noted by the Supreme Court in *Petite v. United States*,[112] is a requirement of the United States Justice Department that mandates prior approval by the Assistant Attorney General for federal prosecution following state prosecution for the same act.[113] Additionally, the *Petite* policy allows the federal government to seek dismissal of a federal indictment or federal conviction.[114] Because the policy is merely an internal guideline for the federal government, however, a defendant cannot rely on it while seeking dismissal of an indictment over the objection of the government.[115]

Second, a state prosecution following a federal prosecution for the same act, though allowed by *Bartkus v. Illinois*,[116] may be prohibited by a state constitution[117] or statute.[118] For example, the South Carolina Narcotics and Controlled Substances Act provides: "If a violation of this article is a

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Code explicitly bars trial in another court for the same act previously tried in municipal or magistrate's court. S.C. CODE ANN. § 17-23-20 (Law. Co-op. 1985).

110. Culberson v. Wainwright, 453 F.2d 1219 (5th Cir.), *cert. denied*, 407 U.S. 913 (1972).

111. *See, e.g.*, Weaver v. Schaaf, 520 S.W.2d 58 (Mo. 1975). In *Weaver*, because there was insufficient evidence that local authorities colluded with the defendant and his attorney on the municipal prosecution, the later state charge was barred. *Id.* at 64-66. The Missouri Supreme Court found nothing improper in defense counsel's seeking to have the local charge brought to trial in order to preclude the later, and more serious, state charge. *Id.* at 64.

112. 361 U.S. 529 (1960) (per curiam).

113. U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL 9-2.142 (1990).

114. *See Petite*, 361 U.S. at 530. The Court later held that it is an abuse of discretion for a district court to refuse the government's request to vacate a conviction. Rinaldi v. United States, 434 U.S. 22 (1977).

115. United States v. King, 590 F.2d 253, 256-57 (8th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979).

116. 359 U.S. 121 (1959).

117. *E.g.*, People v. Cooper, 247 N.W.2d 866 (Mich. 1976).

118. *See* Allen & Ratnaswamy, *supra* note 106, at 823-24 (categorizing such statutes).

violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this State."[119] At least forty states have related limitations on successive prosecutions.[120]

The final limitation on multi-sovereign prosecutions precludes federal authorities from using state prosecution as a tool to avoid the Double Jeopardy Clause's protection following an acquittal in a previous federal trial.[121] In an analogous situation, a lower federal court has held that the United States Attorney's office must not serve as the state prosecutor's tool following a failed state effort to convict.[122] However, mere cooperation between state and federal authorities does not preclude successive prosecutions.[123] If the same act violates both state and federal statutes, which each sovereign has an interest in enforcing, the claim that the prosecution is a sham to subvert the Double Jeopardy Clause is difficult to prove.[124]

III. REPROSECUTION FOLLOWING ACQUITTAL

A. Basic Rule and Definition of Acquittal

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'"[125] The rationale for this fundamental rule is that "[t]o permit a second trial after an acquittal,

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119. S.C. CODE ANN. § 44-53-410 (Law. Co-op. 1985). This exception to permissible prosecutions under the dual sovereignty doctrine is limited to prosecutions under the Narcotics and Controlled Substances Act, S.C. CODE ANN. §§ 44-53-110 to -590 (Law. Co-op. 1985 & Supp. 1992). Research reveals no other limitations in South Carolina law to the dual sovereignty doctrine.

120. Allen & Ratnaswamy, *supra* note 106, at 824 (citing MILLER, *supra* note 12, at 109 n.9).

121. Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959).

122. United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991).

123. *See Bartkus*, 359 U.S. at 122-24. The federal investigator in *Bartkus* turned over to the state prosecutor evidence gathered both before and after the defendant's acquittal on federal bank robbery charges. *Id.* at 122.

124. *See id.* at 123-24; *Pungitore*, 910 F.2d at 1105-07; *see also* Clauson, *supra* note 12, at 1328 n.1558 (discussing *Pungitore* and related cases).

125. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (alterations in original) (quoting United States v. Ball, 163 U.S. 662, 671 (1896)). The basic double jeopardy prohibition against reprosecution following acquittal was recognized in South Carolina during the early nineteenth century. *See, e.g.*, State v. Wright, 7 S.C.L. (2 Tread.) 517 (1814). This protection is still invoked in South Carolina by the plea of *autrefois acquit*. *See* State v. Dobson, 279 S.C. 551, 309 S.E.2d 752 (1983).

however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'"[126] The very essence of double jeopardy protection is the protection from reprosecution following an acquittal.

The Court has long recognized that a jury's verdict of not guilty is an acquittal which precludes reprosecution.[127] Most of the difficulty in this particular area of double jeopardy law concerns determining whether a particular judicial disposition of a case is an acquittal. A court's label that the decree is an acquittal does not necessarily mean that it is one;[128] conversely, some dismissals and post-conviction events are the functional equivalents of an acquittal.[129] The Court has provided a functional definition of an acquittal, which helps to analyze ambiguous judicial decrees: "[A] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'"[130]

B. Types of Acquittals

1. True Acquittals

A jury's verdict of not guilty, a directed verdict of not guilty,[131] and an acquittal on the merits in a bench trial all have the same double jeopardy significance: "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."[132]

The proscription of the Double Jeopardy Clause applies no matter how erroneous or ill-advised the trial court's decision appears to a reviewing court. For example, an acquittal based on insufficient evidence bars reprosecution, even if the insufficiency of the evidence resulted from the trial court's erroneous exclusion of important evidence that might have

126. United States v. Scott, 437 U.S. 82, 91 (1978) (quoting Green v. United States, 355 U.S. 184, 188 (1957)).

127. *See, e.g.*, United States v. Ball, 163 U.S. 662 (1896).

128. *See* Serfass v. United States, 420 U.S. 377, 392 (1975).

129. *See* Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986).

130. *Scott*, 437 U.S. at 97 (second alteration in original) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

131. A directed verdict of not guilty on one or more counts of a multi-count indictment does not preclude conviction by the jury on the remaining counts. Sellers v. Boone, 261 S.C. 462, 467, 200 S.E.2d 686, 689 (1973).

132. *Scott*, 437 U.S. at 91.

established guilt.[133] Such a judgment of acquittal "however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error."[134]

Strictly speaking, once the trial court, prompted by its erroneous ruling excluding important evidence, enters a judgment of acquittal, a reviewing court cannot reverse the verdict. This result highlights the importance of resolving motions to exclude evidence at a pretrial conference, before jeopardy has attached, and from which governmental appeal is permitted.[135]

2. *Implied Acquittals*

When a jury, after being instructed on an offense and a lesser included offense, returns a guilty verdict on the lesser offense, but is silent on the greater, the jury has impliedly acquitted the defendant of greater offense.[136] The implied acquittal is as effective as an explicit acquittal in precluding reprosecution on that charge.[137]

Green v. United States[138] is widely cited by courts explaining implied acquittals.[139] In *Green*, the jury returned a guilty verdict for second degree murder, but was silent on the first degree murder charge. After successfully appealing his conviction for second degree murder, the defendant was reprosecuted for first degree murder under the original indictment and was convicted and sentenced to death.[140] The Court concluded that the Double Jeopardy Clause precluded reprosecuting the defendant for first degree

133. *See* Sanabria v. United States, 437 U.S. 54, 68-69 (1978).

134. *Id.* at 69. The Court had previously stated this position even more emphatically by declaring that an acquittal precludes reprosecution even when "based on an egregiously erroneous foundation." Fong Foo v. United States, 369 U.S. 141, 143 (1962).

135. *See supra* text accompanying note 52. In Sanabria v. United States the evidentiary ruling that excluded the evidence could have been made before jeopardy attached, but in fact was not. Actually, the motion was first made, and denied, at the close of the government's case, well after jeopardy had attached. At the end of the defendant's case, the trial court reviewed its earlier ruling and excluded the evidence. *Sanabria*, 437 U.S. at 58-59.

136. *See* Green v. United States, 355 U.S. 184 (1957).

137. *Id.* at 191.

138. 355 U.S. 184 (1957).

139. *E.g.*, Bozeman v. State, 307 S.C. 172, 174-75, 414 S.E.2d 144, 145-146 (1992) (citing *Green*, 355 U.S. 184); *see* 3 LAFAVE & ISRAEL, *supra* note 12, at 93.

140. *Green*, 355 U.S. at 186. Ordinarily double jeopardy does not preclude retrial of an offense for which a conviction has been reversed. United States v. Ball, 163 U.S. 662, 672 (1896); *see infra* note 242 and accompanying text.

murder because of the jury's implied acquittal on that charge at the original trial.[141]

A careful reading of the *Green* opinion suggests that the Court's conclusion rested not on the jury's having found guilt on the lesser included charge of second degree murder,[142] but on the dismissal of the jury without its having returned a verdict on the first degree murder charge and without extraordinary circumstances that might have precluded the jury from reaching a verdict.[143] Jeopardy attached when the defendant was tried before a jury;[144] but, because the jury was dismissed without having convicted the defendant of first degree murder, double jeopardy precluded the defendant's reprosecution for first degree murder.[145]

3. Pre-Jeopardy "Acquittals"

A pre-jeopardy acquittal is an oxymoron in terms of double jeopardy jurisprudence. Events occurring before jeopardy attaches cannot cause double jeopardy if a subsequent prosecution occurs, because, by definition, the defendant has not previously been placed in jeopardy.

In *Serfass v. United States*,[146] the leading case on this issue, the trial court granted a motion to dismiss the indictment before the jury was empaneled, because the evidence indicated a defense as a matter of law.[147] Jeopardy had not attached because the jury had not been sworn, and the judge was without power to determine guilt or innocence.[148] A dismissal

141. *Green*, 355 U.S. at 190-91. The only issue before the Court was the validity of the reprosecution for first degree murder. Ironically, as the law stands today the facts in *Green* represent a rare situation in which double jeopardy *would* preclude retrial on the original conviction charge. In 1978 the Court concluded that when an appellate court reverses a conviction for insufficient evidence—the reason for the reversal of the second degree murder conviction in *Green*—the conclusion is equivalent to an acquittal and precludes reprosecution. Burks v. United States, 437 U.S. 1, 15-17 (1978), *discussed infra* notes 247-250 and accompanying text.

142. The Court noted that petitioner's claim of double jeopardy was based on the jury's refusal to convict him for first degree murder, not on the jury's having convicted him of second degree murder, a lesser included charge. *Green*, 355 U.S. at 190 n.11.

143. *Id.* at 191. *Green* was not a situation in which a hung jury was unable to agree on a verdict, necessitating a mistrial. Reprosecution after a jury's failure to agree does not violate double jeopardy. *E.g.*, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), *discussed infra* notes 492-503 and accompanying text.

144. *Green*, 355 U.S. at 188.

145. *Id.* at 191. The Court rejected the government's claim that Green had waived his double jeopardy claim against reprosecution on the greater charge by appealing his conviction for second degree murder. *Id.* at 191-92.

146. 420 U.S. 377 (1975).

147. *Id.* at 379-82.

148. *Id.* at 389. For a discussion of the points at which jeopardy attaches, see *supra*

based upon insufficient evidence or upon recognition of a defense established as a matter of law would be the functional equivalent of an acquittal if rendered after jeopardy had attached.[149] However, in *Serfass* the court granted a dismissal before jeopardy attached; consequently, the dismissal did not trigger double jeopardy protection from the government's appeal and planned reprosecution.[150]

In *United States v. Sanford*[151] the Court followed *Serfass*. In *Sanford*, after the first trial ended in mistrial because of a hung jury, the trial court granted the defendant's motion to dismiss the indictment because of a lack of evidence of guilt.[152] The government appealed. The Court concluded that, although jeopardy had attached at the first trial, which ended in a mistrial, a hung jury mistrial does not preclude retrial.[153] When the indictment was dismissed, the charges were once again in a pretrial mode, meaning that jeopardy had not attached; thus, the dismissal could not bar reprosecution.[154]

There seems to be a little slight of hand at work in *Sanford*. If the doctrine of continuing jeopardy makes possible retrial following a mistrial, then, by definition, the accused would appear to be in jeopardy from jeopardy's attachment in the first trial until the conclusion of the subsequent trial, including the time in between the two trials. *Sanford* apparently introduces a concept of "suspended continuing jeopardy" that is applicable during the period between the declaration of mistrial and the point at which jeopardy would have ordinarily attached in the subsequent trial, had it been an initial trial.

4. Post-Verdict Decisions Equivalent to Acquittal

Even after a jury verdict of guilty, there are at least two possible opportunities for judicial rulings that could have a double jeopardy effect similar or equal to that of a true acquittal. First, a trial judge may grant a new trial based on insufficient evidence presented at trial.[155] Second, an

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text accompanying notes 48-51.

149. A dismissal after jeopardy has attached, if based on an insufficiency of the evidence, is the functional equivalent of an acquittal and precludes reprosecution. *See infra* text accompanying note 186.

150. *Serfass*, 420 U.S. at 394.

151. 429 U.S. 14 (1976) (per curiam).

152. The trial court concluded that the government had consented to the defendant's activity which was the basis of a charge of illegal hunting. *Id.* at 14.

153. *Id.* at 15-16 (citing United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824)).

154. *Id.* at 16.

155. In South Carolina trial judges lack the authority to grant a judgment notwithstanding the jury's verdict; they can only grant a motion for a new trial. State v. Miller,

appellate court may reverse a conviction based on insufficient evidence presented during trial.

Currently, the most significant case in the area of insufficient evidence is *Burks v. United States*.[156] In *Burks* the court of appeals reversed a conviction because of insufficient evidence and remanded with direction either to grant a new trial or to enter a judgment of acquittal. The Supreme Court unanimously concluded that the appellate court's determination of insufficient evidence represented a resolution in defendant's favor "of some or all of the factual elements of the offense charged."[157] Thus, instead of remanding the case, the court of appeals should have entered a judgment of acquittal, which would have, of course, precluded reprosecution.[158] The Court rejected the government's claim that, by moving for a new trial, the defendant waived his right to an acquittal based on insufficiency of the evidence.[159]

In *Hudson v. Louisiana*,[160] another unanimous decision, the Court concluded that a trial court's granting a motion for a new trial because of insufficient evidence after a jury has entered a verdict of guilty is the functional equivalent of an acquittal. The *Hudson* Court found *Burks* to be controlling on the double jeopardy significance of the lower court's determination that the evidence was insufficient to warrant conviction. The Court also applied *Burks* to conclude that the defendant's motion for a new trial did not constitute a waiver of double jeopardy protection.[161] In *Hudson* the Court rejected the government's claim that, by disagreeing with the jury's assessment of the weight of the evidence instead of merely determining the sufficiency of the evidence, the trial judge had functioned as a "thirteenth juror."[162]

In *Tibbs v. Florida*,[163] however, the Court accepted the "thirteenth juror" argument. The Court in *Tibbs* upheld the petitioner's conviction in a new trial after the appellate court reversed the original conviction as

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287 S.C. 280, 282 n.2, 337 S.E.2d 883, 884 n.2 (1985).

156. 437 U.S. 1 (1978).

157. *Id.* at 10 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)). The factual issue in *Burks* concerned the defendant's lack of mental capacity to commit the crime. The appellate court concluded that the government did not rebut the defendant's evidence of insanity. *Id.* at 4.

158. *Id.* at 10-11. For the *Burks* rule to apply, it must be clear that the reviewing court granted a new trial because of insufficient evidence and not because of trial error. Green v. Massey, 437 U.S. 19, 24-26 (1978).

159. *Burks*, 437 U.S. at 18.

160. 450 U.S. 40 (1981).

161. *Id.* at 43.

162. *Id.* at 44.

163. 457 U.S. 31 (1982).

against the weight of the evidence.[164] The Court explained the difference between a reversal based on insufficient evidence and a reversal because of a disagreement about the weight of the evidence:

> [A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."[165]

A reversal for insufficient evidence, meaning that no rational fact finder could have voted to convict, is tantamount to an acquittal and bars reprosecution.[166] A reversal for disagreement on the weight of the evidence, in which the appellate court sits as a "thirteenth juror," does not mean that acquittal was the only proper verdict; consequently, reprosecution following such a reversal does not deny protection against double jeopardy.[167] The *Tibbs* Court rejected the defendant's argument that the distinction between the two types of reversals was unworkable and might lead appellate courts to mask reversals based on insufficient evidence as reversals based on disagreement on the weight of the evidence in order not to preclude reprosecution.[168]

The essence of double jeopardy protection, prohibiting retrial following either acquittal or its functional equivalent, is that the government must not risk convicting innocent citizens by wearing down defendants through repeated trials, all the while perfecting its case.[169] The prohibition is against reprosecutions, which are new proceedings at the trial court level in which additional evidence is presented on the merits.

The Double Jeopardy Clause does not prohibit the government from appealing the conclusion of either a trial court or an appellate court that a new trial should be granted because insufficient evidence was presented.[170]

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164. *Id.* at 42.

165. *Id.* at 37-38 (alteration in original) (quoting Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981) (per curiam) (the decision below)).

166. *Id.* at 41-42.

167. *Id.* at 42-44.

168. *Id.* at 44-45. The Court noted in Jackson v. Virginia, 443 U.S. 307 (1979), that the Due Process Clause precludes the validity of any conviction resting on insufficient evidence. However, the Court's reassurance did not persuade Justice White, who wrote for the four dissenters. *Tibbs*, 457 U.S. at 47 (White, J., dissenting).

169. United States v. Wilson, 420 U.S. 332, 342-44 (1975).

170. State v. Dasher, 278 S.C. 395, 400, 297 S.E.2d 414, 417 (1982); *see* United

For example, if a trial court grants a motion for a new trial because of insufficient evidence following the jury's verdict of guilty, the government can, on appeal, contest the trial court's decision. If the appellate court agrees that the trial court's assessment of insufficient evidence was incorrect, then the appellate court can reverse and remand with instructions to enter a judgment of guilty based on the prior jury verdict of guilty. Consequently, because no additional trial court proceedings are required, double jeopardy is not violated.[171]

Analogously, if an intermediate appellate court reverses a judgment of guilty because of a perceived insufficiency of the evidence, the government should be able to seek review in the jurisdiction's court of last result. If the highest court disagrees with the intermediate court's conclusion about the insufficiency of the evidence, the higher court can reverse and remand with instructions to reinstate the original verdict. Double jeopardy would not be violated under these circumstances because no additional trial court proceedings would be required to determine guilt or innocence.

When an appellate court concludes that the lower court should have excluded some prejudicial evidence and then examines the sufficiency of the evidence to sustain the conviction, the appellate court should consider all of the evidence before the trial court, including that which should have been excluded.[172] The inclusion of such evidence could be quite significant. The Double Jeopardy Clause does not preclude retrial following reversal of a conviction because of prejudicial trial error,[173] but does preclude retrial if the reversal was because of insufficient evidence.[174]

States v. Greer, 850 F.2d 1447, 1449 (11th Cir. 1988).

171. *See Greer*, 850 F.2d at 1449. The Supreme Court has never ruled on an appeal from a trial court's judgment of acquittal based on insufficient evidence after a guilty verdict was rendered. However, the Court has ruled that the government can appeal from a trial court's judgment of acquittal after a jury verdict of guilty when the acquittal was based on prejudicial pretrial delay. United States v. Wilson, 420 U.S. 332 (1975).

The *Wilson* Court's reasoning is the reasoning outlined in the above text and followed by the eleventh circuit in *Greer*. Allowing the appeal in this situation does not violate the Double Jeopardy Clause because the appeal cannot result in additional trial court proceedings to determine guilt or innocence. If the appellate court agrees with the government that the trial court's reasoning was in error, the appellate court can reverse and remand with instructions for the trial court to enter a judgment of guilty based on the previous jury verdict of guilty. *See Wilson*, 420 U.S. at 352. However, a post-acquittal appeal that, if successful, would lead to further proceedings to resolve factual issues related to a determination of guilt is prohibited. *See* Smalis v. Pennsylvania, 476 U.S. 140, 145-46 (1986).

172. Lockhart v. Nelson, 488 U.S. 33, 40-41 (1988).

173. United States v. Ball, 163 U.S. 662 (1896); *see infra* notes 241-245 and accompanying text.

174. Burks v. United States, 437 U.S. 1 (1978), *discussed supra* notes 156-159 and

5. *Dismissals: Some Function as Acquittals, and Some Do Not*

Dismissals cause a great deal of difficulty in double jeopardy law because they are often confused with mistrials and acquittals. A judge declaring a mistrial ordinarily contemplates that a subsequent prosecution will occur, and typically a subsequent prosecution does not violate the Double Jeopardy Clause.[175] However a true acquittal, or its functional equivalent, triggers double jeopardy protection against subsequent prosecution.[176] A dismissal is similar to an acquittal in that the issuing judge "contemplates that the proceedings will terminate then and there in favor of the defendant."[177] A dismissal may or may not trigger double jeopardy protection, depending on when and on what grounds the dismissal was issued.

A dismissal prior to the point at which jeopardy attaches is not the functional equivalent of an acquittal as far as the Double Jeopardy Clause is concerned. If such a dismissal is overturned on appeal, subsequent prosecution is not precluded by the Double Jeopardy Clause because no prior jeopardy had attached.[178]

A dismissal granted after jeopardy has attached must be analyzed more closely to see whether it is the functional equivalent of an acquittal. The most useful guide is the Court's definition of an acquittal: "[A] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'"[179]

In *United States v. Scott* the post-jeopardy dismissal based on prejudicial pre-indictment delay did not resolve the factual elements in the defendant's favor.[180] Consequently, it was not an acquittal and did not trigger double jeopardy protection from subsequent prosecution. The Court noted that, by making a motion for dismissal, the defendant deliberately sought termination of the proceedings against him on a basis unrelated to factual guilt or innocence. The Court analogized the motion to a defendant's motion for mistrial, which would also take the case away from the trier of

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accompanying text.

175. *See* United States v. Scott, 437 U.S. 82, 92 (1978). Mistrials are discussed *infra* Part VI.

176. *Scott*, 437 U.S. at 91.

177. *Id.* at 94.

178. Serfass v. United States, 420 U.S. 377 (1975). Pre-jeopardy acquittals are discussed *supra* notes 146-154 and accompanying text.

179. *Scott*, 437 U.S. at 97 (second alteration in original) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

180. *Id.* at 95.

fact without triggering double jeopardy protection.[181]

A mistrial granted at the defendant's request will very rarely trigger double jeopardy protection.[182] However, a post-jeopardy dismissal on procedural grounds and not at the defendant's request might require a different double jeopardy conclusion.

The *Scott* Court accurately characterized the defendant's motion as a deliberate decision to forego his valued right to have his guilt or innocence determined by that particular tribunal.[183] However, at least one federal appellate court has concluded that when a trial court dismisses the case sua sponte, albeit with the defendant's acquiescence, the Double Jeopardy Clause precludes subsequent proceedings.[184] In such circumstances, the defendant is deprived of his valued right to be judged by that particular tribunal.[185]

A post-jeopardy dismissal based on insufficiency of the evidence stands in sharp contrast to the post-jeopardy dismissal on procedural grounds in *Scott*. A dismissal based on insufficiency of the evidence represents a resolution in the defendant's favor of factual matters related to the elements of the crime and, for purposes of double jeopardy, is the functional equivalent of an acquittal.[186]

A problematical South Carolina statute provides that a person acquitted because of a variance between indictment and proof may be arraigned on a new indictment, tried, and convicted.[187] While two early cases approved of the practice authorized by the statute, neither addressed the constitutionality of the statute.[188] Nevertheless, the statute's constitutionality is suspect.

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181. *Id.* at 98-101.

182. *See infra* notes 458-491 and accompanying text.

183. *Scott*, 437 U.S. at 100-01.

184. United States v. Dahlstrum, 655 F.2d 971 (9th Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

185. *Id.* at 975. In *Dahlstrum*, after jeopardy had attached, the trial court dismissed the indictment with prejudice because of governmental misconduct—*viz.*, the IRS's use of a § 7602 summons to aid in a criminal investigation. Defense counsel participated in the judge's dismissal only to the extent of agreeing to the judge's suggestion that findings of fact and conclusions of law be issued. *Id.* at 973. In United States v. Kennings, 861 F.2d 381 (3rd Cir. 1988), the court distinguished *Dahlstrum* because of defense counsel's more active role in securing the dismissal in the latter case. *Id.* at 385 n.6.

186. Smalis v. Pennsylvania, 476 U.S. 140 (1986).

187. S.C. CODE ANN. § 17-23-30 (Law. Co-op. 1985). This section provides:

> If a person on his trial be acquitted upon the ground of a variance between the indictment and the proof or upon an exception to the form or substance of the indictment he may be arraigned again on a new indictment and tried and convicted for the same offense, notwithstanding such former acquittal.

Id.

188. State v. Gowan, 178 S.C. 78, 182 S.E. 159 (1935); State v. Platt, 154 S.C. 1,

An acquittal because of a variance between proof and indictment appears to meet the Court's definition of acquittal—a resolution of some of the factual elements of the offense charged in favor of the defendant.[189] Thus, such an acquittal would preclude reprosecution.[190] If, however, the new indictment charges an offense with different elements from those in the original indictment, then the State would have a good argument that the new offense is not the same offense as the earlier one; therefore, the State's argument continues, the second prosecution does not subject the defendant to double jeopardy.[191]

Faced with a variance between indictment and proof, the State might fare marginally better by requesting a mistrial and arguing that retrial is not prohibited because there was a manifest necessity for the mistrial. This argument is not entirely convincing, especially if the difficulty was foreseeable by exercising due diligence before jeopardy attached.[192]

Regardless of the court's label for the procedural maneuver dismissing the prosecution because of the fatal variance, the dismissal might be treated as the functional equivalent of an acquittal, thereby barring subsequent prosecution.[193] Had the original prosecution resulted in a conviction,

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151 S.E. 206 (1930). In *Gowan* the court upheld the statute as a valid legislative amendment to the common-law rule of *autrefois acquit*, but did not address the statute's constitutionality as per South Carolina Constitution, article I, § 12 (then § 17) because the issue had not been raised below. *Gowan,* 178 S.C. at 83-84, 182 S.E. at 161.

In *Platt* the court reversed a murder conviction because the trial court improperly amended the indictment at trial by charging the place of the murder victim's demise. *Platt*, 154 S.C. at 22, 151 S.E. at 213. In dictum, the court observed that the defendant could be held pending re-indictment and trial, but did not address any constitutional issues involved. *Id.*

The Double Jeopardy Clause of the Fifth Amendment could not have been in issue in either case because the Clause was not applicable to the states until 1969. *See* Benton v. Maryland, 395 U.S. 784 (1969), *discussed supra* text accompanying note 37.

189. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

190. *See* United States v. Scott, 437 U.S. 82, 91 (1978).

191. This argument may have been foreclosed by the 1990 case of Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon. 113 S. Ct. 2849 (1993), with its "same conduct" approach to defining "same offense." After *Dixon*, the State's argument should prevail if "same offense" is to be exclusively defined by the elements test of Blockburger v. United States, 284 U.S. 299 (1932). *See infra* part V.B.

192. *Compare* Illinois v. Somerville, 410 U.S. 458 (1973) (holding that mistrial because the indictment failed to allege an offense met the manifest-necessity standard) *with* Downum v. United States, 372 U.S. 734 (1963) (holding that mistrial because prosecution failed to secure the attendance of an important witness did not meet the manifest-necessity standard). *Somerville*, *Downum*, and the issue raised in the text above are discussed *infra* notes 518-533 and accompanying text.

193. *See* Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986).

reprosecution would be permissible if the appellate court reversed because the original indictment was either defective[194] or charged the wrong offense.[195]

C. *Collateral Estoppel*

In *Ashe v. Swenson*[196] the Court concluded that the Double Jeopardy Clause embodies the doctrine of collateral estoppel, which precludes relitigation of an issue of ultimate fact previously determined by a valid and final judgment.[197] However, relatively few cases implicate the collateral estoppel component of the Double Jeopardy Clause.[198]

To collaterally estop the government, the defendant must establish that a particular factual issue had previously been resolved in his favor. *Ashe* is a classic example of such a case. In *Ashe* the defendant was one of four persons who allegedly robbed six men at a poker game. In his first trial the defendant was acquitted of robbing one of the victims. During the first trial uncontroverted testimony established that the victim had been a participant in the poker game and had been robbed. The only contested issue was whether the defendant was one of the robbers, but the State's evidence against the defendant was weak.[199]

Following acquittal on the first charge, the defendant was tried and convicted for having robbed one of the other poker players.[200] Significantly, in the second trial the State had tightened its presentation.[201] The Court concluded that the defendant's identity as one of the robbers had been

194. *See* United States v. Ball, 163 U.S. 662 (1896).

195. *See* Montana v. Hall, 481 U.S. 400 (1987).

196. 397 U.S. 436 (1970).

197. *Id.* at 443.

198. If the first case involved the same offense as the subsequent charge, the basic double jeopardy protection against multiple prosecution for the same offense applies, not collateral estoppel.

199. *Ashe*, 397 U.S. at 438. The State's witnesses could not agree on how many robbers robbed them. Two of the victims could not identify the defendant, and the other two victims who testified made ambiguous identifications of the defendant. *Id.*

200. The basic double jeopardy protection against reprosecution following acquittal of the same offense was inapplicable because the two charges were not for the same offense. Robbing six poker players constitutes six separate offenses because each charge involves a separate factual element—the identity of the victim. *See* State v. Corbett, 117 S.C. 356, 109 S.E. 133 (1921).

201. *Ashe*, 397 U.S. at 440. In the second trial the witnesses were much more certain in their identification of the defendant, and the victim whose identification in the first trial had been conspicuously negative was not called in the second trial. *Id.*

resolved in the defendant's favor at the earlier trial and could not be relitigated in a second trial.[202]

Because verdicts in criminal cases are general, except for insanity verdicts, a defendant may have difficulty establishing that a particular factual issue has been resolved in his favor by the prior decision. A court considering a prior general verdict of acquittal is "to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'"[203]

Applying this test, the Court in *Turner v. Arkansas*[204] concluded that a defendant who was acquitted of felony murder for killing someone during the course of a robbery could not subsequently be charged for the underlying robbery.[205] The State's theory in the robbery trial was that the jury might have concluded that the defendant and another robbed the victim, but that the other participant killed the victim. The Court noted that, in light of the trial court's instructions on accomplice liability, if the jury found that the defendant participated in the robbery, the jury would have been obligated to convict for murder.[206] Consequently, the jury's acquittal of murder represented its conclusion that the defendant was not present at the crime scene; therefore, collateral estoppel precluded a subsequent prosecution for robbery.[207]

Another possible explanation for the acquittal in *Turner* is that the jury simply ignored the instruction on accomplice liability, finding it unjust to convict someone of murder who did not actually pull the trigger. Significantly, the Court was willing to overlook the possibility of jury nullification. Any judgment of acquittal could conceivably be explained in terms of nullification, even the acquittal on the original robbery charge in *Ashe v. Swenson*. The mere possibility of jury nullification is apparently not enough to undermine the defendant's collateral estoppel argument.

The Court's receptivity to collateral estoppel claims is further evidenced by *Harris v. Washington*,[208] in which an acquittal for the murder of one victim of a bomb blast precluded a subsequent prosecution for the murder of another killed by the same blast. Although the State's evidence on the

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202. *Id.* at 446.

203. *Id.* at 444 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960)).

204. 407 U.S. 366 (1972) (per curiam).

205. *Id.* at 369-70.

206. *Id.* at 369.

207. *Id.* at 369-70.

208. 404 U.S. 55 (1971).

crucial identity issue in the first trial was hampered by erroneous rulings, collateral estoppel applied in the subsequent trial.[209] The State's good faith in bringing successive prosecutions was not enough to shield it from the effects of collateral estoppel.[210]

Nonetheless, collateral estoppel is often difficult to establish. In *State v. Hess*[211] the defendant, the former Chief of the Columbia Police Department, was convicted in Lexington County of misconduct in office, but acquitted of accepting a bribe, extortion, and obstruction of justice. All of the charges stemmed from the Chief's allegedly receiving money for providing police information to people under criminal investigation.[212] The Chief was subsequently prosecuted in Calhoun County for the same conduct[213] and was convicted of obstruction of justice and misconduct in office, but acquitted of bribery and extortion. The South Carolina Supreme Court reversed the conviction for misconduct in office on double jeopardy grounds, finding that misconduct in office is a continuing offense, the same offense for which he had previously been convicted.[214]

However, the court rejected the Chief's collateral estoppel claim on the obstruction of justice charge.[215] In both prosecutions the Chief contended that his purpose had been to lure the criminal suspect into an act of bribery in order to make a case against him. The Chief argued that an essential element of the obstruction of justice charge is corrupt intent and that, because the first jury acquitted him of bribery, extortion, and obstruction of justice, the jury must not have found corrupt intent. The court disagreed,

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209. *Id.* at 56.

210. *Id.* at 56-57. In Ashe v. Swenson the State had "frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: . . . [the prosecutor] 'refined his presentation in light of the turn of events at the first trial.'" Ashe v. Swenson, 397 U.S. 436, 447 (1970) (quoting Brief of Respondent).

211. 279 S.C. 525, 309 S.E.2d 741, *cert. denied*, 464 U.S. 995 (1983).

212. *Id.* at 527, 309 S.E.2d at 742. The facts in *Hess* are summarized in more detail in the state supreme court's decision affirming the Lexington County conviction. State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983).

213. The rules in Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993), would have precluded prosecution for the same conduct that constituted an element of a crime in an earlier prosecution. Consequently, under the same-conduct test of *Grady* the entire second prosection in *Hess* might be prohibited by the Double Jeopardy Clause. *Grady* and *Dixon* are discussed *infra* part V.B.

In State v. Wilson, 429 S.E.2d 453 (S.C. 1993), the South Carolina Supreme Court recently addressed both *Grady* and collateral estoppel issues. *Wilson* is discussed *infra* notes 423-435 and accompanying text.

214. *Hess*, 279 S.C. at 528-29, 309 S.E.2d at 742-43.

215. *Id.* at 527, 309 S.E.2d at 742.

concluding that the first jury must have found corrupt intent to have convicted him of misconduct in office.[216] Consequently, the crucial factual issue on the existence of corrupt intent had not been resolved in the defendant's favor in the first trial; therefore, collateral estoppel did not apply.[217]

If the factual issue resolved in the defendant's favor during the first trial is not an issue in a subsequent proceeding, then collateral estoppel is not applicable. In *One Lot Emerald Cut Stones v. United States*[218] the defendant, who had previously been acquitted of smuggling, subsequently lost his jewels in a forfeiture proceeding.[219] At the smuggling trial the court expressly found that the government had failed to establish an intent to defraud.[220] Nonetheless, collateral estoppel did not bar the forfeiture proceeding because the forfeiture required only proof of physical importation without declaration, not proof of intent to defraud.[221]

While *Ashe v. Swenson* clearly holds that parts of collateral estoppel are encompassed within the Double Jeopardy Clause,[222] the South Carolina Supreme Court has referred to collateral estoppel and double jeopardy as two distinct bodies of law;[223] and to some extent they are separate. Collateral estoppel evolved on the civil side of the docket, and not all collateral estoppel aspects are applicable in the criminal context. For example, the doctrine of mutuality does not apply to criminal cases.[224] Ordinarily, collateral estoppel cannot be used against a defendant; thus, the State is not entitled to a directed verdict based on a factual element earlier resolved against the defendant.[225] A defendant may, however, be collaterally estopped from challenging facts admitted earlier pursuant to a guilty plea.[226]

Guilty pleas may also affect the double jeopardy aspects of collateral

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216. *Id.* at 527-28, 309 S.E.2d at 742.

217. *Id.*

218. 409 U.S. 232 (1972).

219. Forfeiture proceedings are civil proceedings to which the Double Jeopardy Clause does not apply. *Id.* at 235-37; *see supra* text accompanying note 87.

220. *Emerald Cut Stones*, 409 U.S. at 234.

221. *Id.*

222. Ashe v. Swenson, 397 U.S. 436, 445 (1970).

223. State v. Mills, 281 S.C. 60, 62, 314 S.E.2d 324, 325 ("We hold that the Respondent can find no comfort in either the law of double jeopardy or collateral estoppel."), *cert. denied*, 469 U.S. 930 (1984).

224. *Ashe*, 397 U.S. at 443; *id.* at 464-65 (Burger, C.J., dissenting).

225. *See* Simpson v. Florida, 403 U.S. 384, 386 (1971) (per curiam). A directed verdict of this nature would deprive the defendant of his Sixth Amendment right to trial by jury.

226. *See* United States v. Broce, 488 U.S. 563, 573-74 (1989).

estoppel in other ways. A guilty verdict for a lesser included offense of the offense charged is, for double jeopardy purposes, an implied acquittal of the greater offense.[227] The defendant cannot be reprosecuted for the greater offense, and collateral estoppel precludes the government from attempting to establish the factual element resolved in the defendant's favor by the implied acquittal.[228] However, when the defendant enters a guilty plea to the lesser offense over the government's objection, and the government prosecutes the greater offense in the same proceeding, the guilty plea does not serve as a resolution of the factual issue in the defendant's favor.[229] The South Carolina Court of Appeals has likewise concluded that the collateral estoppel component of the protection against double jeopardy does not preclude subsequent prosecution for the greater offense following an earlier guilty plea to the lesser offense.[230]

The different burden of proof requirements in criminal and quasi-criminal proceedings pose an additional obstacle to implementing collateral estoppel. Conviction for a criminal offense requires proof beyond a reasonable doubt.[231] Therefore, an acquittal means that reasonable doubt existed about the defendant's guilt, not necessarily that the defendant was innocent. Accordingly, an acquittal does not estop the government from seeking to establish the same facts in a subsequent proceeding with a less vigorous standard of proof, such as the preponderance of the evidence standard in a civil forfeiture proceeding.[232] By similar reasoning, a "majority of American jurisdictions which have passed on the issue have held that an acquittal in a criminal proceeding does not bar revocation of parole or probation on the underlying charge."[233] However, when an acquittal is based on an affirmative defense, such as entrapment, which the defendant must establish by a preponderance of the evidence, the acquittal will estop the subsequent revocation proceeding.[234]

In *Dowling v. United States*[235] the Supreme Court employed similar

227. Green v. United States, 355 U.S. 184 (1957). The implied acquittal doctrine of *Green* is discussed *supra* notes 136-145 and accompanying text.

228. Pugliese v. Perrin, 731 F.2d 85 (1st Cir. 1984).

229. Ohio v. Johnson, 467 U.S. 493 (1984). Because the greater charges were pursued in the same proceeding, double jeopardy's finality concerns were not implicated. *Id.* at 501-02.

230. State v. Jefferies, 304 S.C. 141, 403 S.E.2d 169 (Ct. App. 1991), *rev'd on other grounds*, 112 S. Ct. 1464 (1992).

231. *E.g., In re* Winship, 397 U.S. 358 (1970).

232. *See, e.g.,* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972).

233. People *ex rel.* Dowdy v. Smith, 399 N.E.2d 894, 896 (N.Y. 1979).

234. *Id.* at 897.

235. 493 U.S. 342 (1990).

reasoning to conclude that evidence of a crime of which the defendant had been acquitted may be admissible in a subsequent trial involving similar circumstances.[236] Introducing acquittal evidence does not offend the collateral estoppel component of the Double Jeopardy Clause because of the different levels of proof required. While the earlier acquittal represented a failure to establish guilt beyond a reasonable double, evidence of prior crimes is admissible "if the jury can reasonably conclude that the act occurred and that the defendant was the actor"[237]—a lesser standard. In *United States v. Felix*[238] the Court recently referred to *Dowling* as "an endorsement of the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct."[239]

IV. REPROSECUTION FOLLOWING CONVICTION

One of the basic guarantees of the Double Jeopardy Clause is the prohibition against a second prosecution for the same offense of which one has already been convicted.[240] A necessary exception to this rule has long been recognized: reprosecution of a defendant whose conviction has been reversed on appeal is allowed. As the Court observed in *United States v. Ball*,[241] "it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted."[242]

The *Ball* rule serves both the public's interest in punishing the guilty and the defendant's interest in having an effective appellate system that ensures a fair trial.

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate

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236. *Id.* at 347-50. In the bank robbery trial at issue in *Dowling*, the trial court admitted *modus operandi* evidence of another armed robbery for which the defendant had been acquitted. *Id.* at 345-46.

237. *Id.* at 348.

238. 112 S. Ct. 1377 (1992).

239. *Id.* at 1383. *Felix* is discussed *infra* notes 349-364 and accompanying text.

240. Brown v. Ohio, 432 U.S. 161, 165-66 (1977); *Ex Parte* Nielsen, 131 U.S. 176, 183 (1889). Determining whether the offenses in the two prosecutions are the same is, however, surprising complex. *See infra* Part V.

241. 163 U.S. 662 (1896).

242. *Id.* at 672.

> courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.[243]

The *Ball* rule allows reprosecution following reversal of a conviction either on collateral review or on direct appeal, regardless of whether the initial conviction was pursuant to a jury verdict of guilty or the defendant's guilty plea.[244] Additionally, the reprosecution following reversal of a conviction need not be pursuant to the same statute under which the defendant was initially charged.[245]

The *Ball* rule is inapplicable, however, if the conviction was reversed because of insufficient evidence to support the conviction.[246] In *Burks v. United States*[247] the Court reasoned that the appellate court's conclusion of insufficient evidence, which represented a resolution in the defendant's favor of some or all of the elements of the offense, is analogous to a trial court's granting a motion for a directed verdict based on insufficient evidence.[248] Because the trial court's acquittal would have precluded reprosecution for the same offense,[249] the Court unanimously concluded that the appellate court's finding of insufficient evidence should have the same effect; otherwise, the prosecution would be afforded another opportunity to marshal enough evidence to convict—an opportunity the Double Jeopardy Clause prohibits.[250]

A reversal of a conviction for insufficient evidence must be distinguished from a reversal because of the appellate court's disagreement with the trial court's assessment of the weight of the evidence. Reversal on the latter ground does not preclude reprosecution.[251] The *Burks* rule applies

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243. United States v. Tateo, 377 U.S. 463, 466 (1964).

244. *See id.* at 466-67. *Tateo* involved a retrial after the appellate court reversed the defendant's conviction on collateral review because the court found that the guilty plea was involuntary. *Id.*

245. Montana v. Hall, 481 U.S. 400 (1987). In *Hall* the Court concluded that a defendant whose incest conviction had been reversed could subsequently be prosecuted under a criminal sexual assault statute. *Id.* at 403.

246. Burks v. United States, 437 U.S. 1, 18 (1978).

247. 437 U.S. 1 (1978).

248. *Id.* at 10-11. The only factual issue on appeal in *Burks* was the defendant's mental capacity to commit the crime. *Id.* at 3.

249. *Id.* at 10-11.

250. *Id.* at 11.

251. Tibbs v. Florida, 457 U.S. 31 (1982); For a discussion of reversal pursuant to the "thirteenth juror" standard employed in *Tibbs*, see *supra* notes 163-168 and accompanying text.

when the reversal was clearly based on the insufficiency of the evidence.[252]

If an appellate court concludes that a conviction is based on insufficient evidence, but that sufficient evidence exists to sustain a conviction for a lesser included offense, could the court reverse the conviction and remand with orders to enter a conviction for the lesser included offense? Or, could the court reverse and remand for retrial on the lesser included offense? In *Green v. Massey*,[253] a companion case to *Burks*, the Supreme Court noted the existence of these issues without resolving them.[254]

Pre-*Burks* appellate decisions, both state and federal, regularly reversed convictions based on insufficient evidence and remanded with instructions to enter guilty verdicts on lesser included offenses.[255] Post-*Burks* decisions are split. Cases finding no double jeopardy violation when an appellate court orders conviction for a lesser included offense reason that the jury necessarily found the existence of every element of the lesser included offense in order to convict of the greater offense. Therefore, if the element distinguishing the greater from the lesser offense is the only insufficiently supported element, the defendant is properly convicted of the lesser offense.[256] A contrary decision concluded that allowing reprosecution on the lesser included offense forces the accused to "run the gauntlet" again.[257]

Burks appears not to preclude reprosecution for a lesser included offense following reversal of a conviction for the greater offense based on insufficient evidence on the element that distinguishes the greater offense from the lesser offense; however, reversing and remanding with instructions to enter a guilty verdict for the lesser included offense seems inappropriate. Certainly the original jury must have found that every element of the lesser offense existed in order to convict of the greater. Yet, it does not necessarily follow that the jury would have convicted for the lesser offense had it been

252. Green v. Massey, 437 U.S. 19, 25-26 (1978).

253. 437 U.S. 19 (1978).

254. *Id.* at 25 n.7.

255. *E.g.*, United States v. Cobb, 558 F.2d 486 (8th Cir. 1977); Luitze v. State, 234 N.W. 382 (1931); *see also* 3 LAFAVE & ISRAEL, *supra* note 12, at 91 n.31 (citing both *Cobb* and *Luitze*).

256. *See* Dickenson v. Israel, 482 F. Supp. 1223, 1226 (E.D. Wis. 1980), *aff'd*, 644 F.2d 308 (7th Cir. 1981); *Ex parte* Edwards, 452 So. 2d 508, 510 (Ala. 1984).

257. Stephens v. State, 806 S.W.2d 812, 819 (Tex. Crim. App. 1990), *cert. denied*, 112 S. Ct. 350 (1991). In *Stephens* the jury had not been instructed on the lesser included offense. *Id.* at 817. Nonetheless, the jury apparently found that every element of the lesser included offense was established, else it could not have convicted of the greater offense.

presented with only the lesser charge.[258] Consequently, the better practice is to reverse the conviction for the greater offense and remand for retrial on the lesser included offense.

After an intermediate appellate court reverses a conviction based on insufficient evidence, the State can seek review of the reversal in a higher appellate court without violating the Double Jeopardy Clause.[259] If the higher court disagrees with the intermediate court's conclusion of insufficient evidence, then the higher court can simply reverse the intermediate court's decision and remand with instructions to reinstate the original conviction. No double jeopardy would occur because no additional factual determinations would be made at the trial court level.[260]

Because of the nature of appellate review on the sufficiency of the evidence,[261] the *Burks* exception to the *Ball* rule that allows reprosecution following reversal of conviction will affect relatively few cases.[262] Of course, the law recognizes other grounds, unrelated to the Double Jeopardy Clause, for reversing a conviction that would preclude reprosecution.[263]

V. THE SAME OFFENSE

The Double Jeopardy Clause prohibits not only reprosecution for the

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258. *See Edwards*, 452 So. 2d at 510-11 (Jones, J., dissenting).

259. United States v. Forcellati, 610 F.2d 25 (1st Cir. 1979), *cert. denied*, 445 U.S. 944 (1980).

260. *Id.* at 29-30. In *Forcellati* the defendant was convicted at a non-jury trial before a magistrate. The district court reversed the conviction, and the government appealed. *Id.* at 27. The court of appeals reversed the district court and reinstated the conviction. *Id.* at 32. The *Forcellati* court followed the reasoning of United States v. Wilson, 420 U.S. 332, 344 (1975), and found no double jeopardy because reversing the district court with an order to enter a judgment of guilty based on the pre-existing verdict would not subject the defendant to additional trial court proceedings on guilt or innocence. *Forcellati*, 610 F.2d at 29.

261. A federal appellate court must sustain the conviction if there is substantial evidence, viewed in the light most favorable to the government, to uphold the guilty verdict. Burks v. United States, 437 U.S. 1, 17 (1978) (citing Glasser v. United States, 315 U.S. 60, 80 (1942)). The standard for appellate review of the sufficiency of the evidence is similar in South Carolina. *See* State v. Dasher, 278 S.C. 395, 400, 297 S.E.2d 414, 416-17 (1982).

262. A reviewing court which has concluded that evidence was improperly admitted at trial should nonetheless consider the improperly admitted evidence when judging the sufficiency of the evidence. *See* Lockhart v. Nelson, 488 U.S. 33 (1988), *discussed supra* text accompanying note 172.

263. For example, a conviction reversed because of violation of an accused's right to a speedy trial pursuant to the Sixth Amendment must result in dismissal of the charge. Strunk v. United States, 412 U.S. 434, 440 (1973).

same offense following conviction or acquittal for that offense, but also multiple punishments for the same offense.[264] Obviously, determining whether one offense is the same as another is crucial, especially in light of "the extraordinary proliferation of overlapping and related statutory offenses . . . [that makes it] possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction."[265] Two distinctly different scenarios present situations in which a "same offense" determination must be made: reprosecution following a prior acquittal or conviction, and multiple charges arising out of a single incident and pursued in a single prosecution.

There is considerable confusion about the extent to which the tests for same offense in the two different contexts are themselves the same. In *United States v. Dixon*,[266] which overruled the three-year-old case of *Grady v. Corbin*,[267] the Court stated that the tests are the same, although the application of the test in *Dixon* suggests that they may not be.[268] Consequently, short-lived as it may have been, *Grady*'s same-conduct test will be developed in some detail, *infra*.[269]

A. Multiple Charges in a Single Prosecution

Double jeopardy law regarding multiple charges in a single prosecution is reasonably clear. Probably the most familiar and most frequently cited test for "same offense" is in *Blockburger v. United States*:[270] "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether

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264. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

265. Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970).

266. 113 S. Ct. 2849 (1993).

267. 495 U.S. 508 (1990), *overruled by Dixon*, 113 S. Ct. 2849.

268. Justice Scalia wrote the majority opinion in *Dixon*, but lost three of his four supporting votes when he applied Blockburger v. United States, 284 U.S. 299 (1932), to find a double jeopardy bar to the successive prosecution of some of the counts under review. Speaking for the departing three justices, Chief Justice Rehnquist found Scalia's analysis to be remarkably *Grady*-like for a case that had overruled *Grady*. *Dixon*, 113 S. Ct. at 2866-67 (Rehnquist, C.J., concurring in part and dissenting in part).

269. Some courts, including those which adopted the same-conduct test in advance of *Grady*, *see* State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986), may be persuaded by Souter's *Dixon* dissent and may continue to apply the same-conduct test as a function of state constitutional law. *See Dixon*, 113 S. Ct. at 2881-91 (Souter, J., concurring in the judgment in part and dissenting in part).

270. 284 U.S. 299 (1932). *Blockburger* is now said to provide the test for same offense in the context of successive prosecutions, as well as in the context of multiple punishments in a single trial. *See Dixon*, 113 S. Ct. 2849, *discussed infra* notes 366-397 and accompanying text.

these are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."[271]

Applying this test, the Court in *Blockburger* concluded that a single sale of contraband could support convictions, in a single trial, for violations of separate statutory provisions.[272] The statutes created two distinct offenses, each of which contained an element that the other did not; the single act of selling violated both statues.[273] The prosection in *Blockburger* involved a single instance of conduct—one sale of narcotics—that violated two statutory provisions. Yet, no double jeopardy violation occurred because, in the context of a single prosecution, the Double Jeopardy Clause does not prohibit multiple punishments for a single criminal act.[274] "'[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'"[275]

The *Blockburger* test is a guide, and no more than that, to ascertaining whether the legislature intended to authorize multiple punishment for a single act.[276] If the legislature defined two offenses with different elements, as in *Blockburger*, the intent was to authorize multiple punishments. Conversely, if each offense does not contain at least one element that the other does not, then the legislature did not intend to authorize separate punishments for a single act.[277]

Numerous South Carolina cases have followed the *Blockburger*

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

272. *Id.* at 303-04.

273. *Id.* One of the statutes violated in *Blockburger* provided: "'It shall be 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 . . . .'" *Id.* at 301 n.1 (quoting 26 U.S.C. § 692 (1926)). The other violated statute provided:

> "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

Id. at 301 n.2 (quoting 26 U.S.C. § 696 (1926)).

274. Missouri v. Hunter, 459 U.S. 359, 366 (1983).

275. Grady v. Corbin, 495 U.S. 508, 516 (1990) (quoting *Hunter*, 459 U.S. at 366), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993). To the extent that any quasi-*Grady* same-conduct test survives at all, it applies only in the context of successive prosecutions, not in the context of multiple charges in a single prosecution.

276. Albernaz v. United States, 450 U.S. 333, 340 (1981) ("The *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.").

277. United States v. Maldonado-Rivera, 922 F.2d 934, 981-82 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991).

reasoning and have concluded that multiple punishments are not authorized for a single criminal act that violates two or more statutory offenses unless each statute contains independent elements.[278]

Because *Blockburger* is only a guide to statutory interpretation, the fact that each of two offenses contains an independent element does not compel the conclusion that the legislature intended multiple punishment for a single criminal act. In *State v. Walsh*[279] the South Carolina Supreme Court concluded that, although the statutory offense of pointing a firearm[280] and the common-law offense of assault with intent to kill[281] have independent elements, the legislature did not indicate an intention to authorize multiple punishments for a single criminal act when it enacted the statute about pointing a firearm.[282]

The South Carolina court has dispensed with *Blockburger* analysis when the legislative intent concerning multiple punishments for a single criminal act is clear from the statute's structure.[283] In *Matthews v. State*[284] the court focused on the statutory scheme of increasing punishments for possession of marijuana with intent to distribute and for trafficking in marijuana. The court concluded that separate penalties for possession with intent to distribute and for trafficking were not authorized for the same act of possession, without regard to whether the two offenses have independent elements.[285]

In *Missouri v. Hunter*[286] the Court sustained separate punishments for a single criminal act. The defendant had been convicted for both first degree robbery while using a dangerous or deadly weapon and armed criminal

278. *E.g.*, State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (holding that larceny is a lesser included offense of robbery); State v. Lawson, 279 S.C. 266, 305 S.E.2d 249 (1983) (same).

279. 300 S.C. 427, 388 S.E.2d 777 (1990).

280. S.C. CODE ANN. § 16-23-410 (Law. Co-op. 1985).

281. State v. McKeller, 85 S.C. 236, 67 S.E. 314 (1910), *cited in Walsh*, 300 S.C. at 429, 388 S.E.2d at 779.

282. *Walsh*, 300 S.C. at 431, 388 S.E.2d at 780.

283. *See, e.g.*, Matthews v. State, 300 S.C. 238, 240, 387 S.E.2d 258, 259 (1990).

284. 300 S.C. 238, 387 S.E.2d 258 (1990).

285. *Id.* at 240, 387 S.E.2d at 259. Possession with intent to distribute requires possession of any amount plus the requisite intent, which may be inferred from possession of at least one ounce of marijuana. S.C. CODE ANN. § 44-53-370(d)(3) (Law. Co-op. 1985). Trafficking depends solely on possession of at least ten pounds of marijuana without a requirement of proof of intent to distribute. S.C. CODE ANN. § 44-53-370(e)(1) (Law. Co-op. 1985 & Supp. 1991). The two sections have independent elements—intent to distribute for the former, and possession of ten pounds for the latter. Nonetheless, the court's conclusion that the legislature did not intend to authorize multiple punishments appears sound when the statute's overall structure is examined.

286. 459 U.S. 359 (1983).

action.[287] Even though, according to the *Blockburger* test, the two offenses were not distinct because the offenses did not contain independent elements, the legislative intent to authorize separate punishments was nonetheless clear.[288] Consequently, the separate convictions and punishments for the single act imposed in a single criminal prosecution did not violate the Double Jeopardy Clause.[289]

Confronted with facts and statutory offenses quite similar to those in *Missouri v. Hunter*, the South Carolina Supreme Court concluded that separate punishments for armed robbery and possession of a weapon during a violent crime are permissible for a single criminal act prosecuted in a single trial.[290] Because the legislative intent to authorize multiple punishment is clear on the face of the statute about possession of a weapon during a violent crime,[291] multiple punishments do not violate the Double Jeopardy Clause.[292]

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287. *Id.* at 362.

288. *Id.* at 368-69. The Missouri statute that prescribes the punishment for robbery in the first degree provides in pertinent part: "'Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years.'" *Id.* at 361-62 (quoting MO. ANN. STAT. § 560.135 (Vernon 1979)). The Missouri statute that proscribes armed criminal action provides in pertinent part:

> "[A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. *The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon.* No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years."

Id. at 362 (quoting MO. ANN. STAT. §559.225 (Vernon 1979) (emphasis added)).

289. *Id.* at 368-69.

290. State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

291. S.C. CODE ANN. § 16-23-490 (Law. Co-op. Supp. 1991). This statute provides:

> Any person who is convicted of committing or attempting to commit a violent crime as defined in § 16-1-60, if the person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of the violent crime, shall, *in addition to the punishment provided for the crime,* be punished by a term of imprisonment of five years.

Id. (emphasis added).

292. *Bolden*, 303 S.C. at 44, 398 S.E.2d at 495. The court's conclusion on the double jeopardy issue in *Bolden* is dictum because the conviction was reversed on other grounds. *Id.* Nonetheless, the court's reasoning on the double jeopardy issue appears sound.

Furthermore, in *State v. Hall*[293] the court also relied on *Hunter*'s analysis to sustain convictions for kidnapping and criminal sexual conduct in the first degree during a single criminal act, even though kidnapping may have been used to escalate the criminal sexual conduct to the first degree.[294]

What may appear, at first glance, to be a single criminal act may nonetheless embody a number of discrete violations of the same criminal statute. The facts in the collateral estoppel case, *Ashe v. Swenson*,[295] provide an excellent example. In *Ashe* three or four masked gunmen robbed six players in a poker game. Each of the gunmen could have been prosecuted for six counts of armed robbery,[296] as well as for one count of grand larceny, because the gunmen stole one of the poker players' automobiles to make a getaway.[297] Similarly, in *Blockburger* the defendant's selling of contraband twice to the same vendee was held to constitute separate offenses, each of which could have been separately prosecuted.[298]

B. Successive Prosecutions
1. Federal Cases
a. The Traditional Test

The test of *Blockburger v. United States*[299] for same offense,

293. 280 S.C. 74, 76, 310 S.E.2d 429, 431 (1983).

294. *Id.* at 76, 310 S.E.2d at 431; *see also* State v. Dildine, 306 S.C. 198, 202, 410 S.E.2d 597, 599-600 (Ct. App. 1991) (upholding consecutive sentences for kidnapping, assault and battery of a high and aggravated nature, and attempted criminal sexual conduct, all stemming from a single criminal act). The *Hall* case is muddied by the fact that the assailant also used a deadly weapon in the assault, which also could have raised the underlying criminal sexual conduct to the first degree. *See* S.C. CODE ANN. § 16-3-652 (Law. Co-op. 1985).

295. 397 U.S. 436 (1970).

296. *See id.* at 446. In his concurring opinion, Justice Brennan cited a case in which each of 75 poker hands was found to constitute a separate offense against gambling laws. Johnson v. Commonwealth, 256 S.W. 388 (Ky. Ct. App. 1923), *cited in Ashe*, 397 U.S. at 451 (Brennan, J., concurring). Justice Brennan's point was not that the six robberies were one offense, but that the Double Jeopardy Clause requires that they all be prosecuted in a single trial rather than one at a time in successive prosecutions. *Ashe*, 397 U.S. at 453-54.

297. *See Ashe*, 397 U.S. at 437-38.

298. Blockburger v. United States, 284 U.S. 299, 301-03 (1932). While this position has never been explicitly endorsed by a majority of the Court, Justice Scalia complained that the Court's conclusion in Grady v. Corbin has that effect. Grady v. Corbin, 495 U.S. 508, 536-43 (1990) (Scalia, J., dissenting), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993).

299. 284 U.S. 299 (1932).

"whether each provision requires proof of an additional fact that the other does not,"[300] is the traditional standard for double jeopardy analysis of successive prosecutions. Employing this test, the Court in *Brown v. Ohio*[301] concluded that a prosecution for auto theft was foreclosed by an earlier conviction for the lesser included offense of joyriding.[302] Joyriding in Ohio involves taking another's vehicle without permission; auto theft is joyriding plus the intent to permanently deprive the owner of possession.[303] Consequently, according to *Blockburger*, joyriding is the same offense as auto theft because joyriding fails to require proof of a fact that auto theft does not. Therefore, the Double Jeopardy Clause prohibits prosecution for the latter offense following conviction for the former.[304] Indeed, the Court noted that "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."[305] The Court rejected the State's contention that the auto theft could be prosecuted on the date the car was taken and joyriding at some later date.[306]

The *Brown* Court's dictum concerning the irrelevance of whether the greater or lesser offense is prosecuted first soon became a holding. In *Harris v. Oklahoma*[307] the Court considered whether the greater or lesser offense should be prosecuted first. The Court concluded that a felony murder conviction precluded subsequent prosecution for the underlying felony.[308]

Jeffers v. United States,[309] a companion case to *Brown v. Ohio*, established that the Double Jeopardy Clause does not bar successive prosecutions if the defendant is responsible for the charges' not having been

300. *Id.* at 304.

301. 432 U.S. 161 (1977).

302. *Id.* at 168-69.

303. *Id.* at 167.

304. *Id* at 169.

305. *Id.* The Court noted an important exception to this rule: when, at the time of the prosecution for the lesser offense, the greater could not have been prosecuted because additional facts necessary to the greater charge had not occurred or had not been discovered despite the State's exercise of due diligence. *Id.* at 169 n.7.

306. *Id.* at 169-70. Of course, one might have taken a car initially without an intent to permanently deprive the owner of possession, but subsequently formed that intent, in which case what started out as joyriding did not become auto theft until later. In such a situation, however, it is difficult to imagine either how the joyriding offense might be prosecuted before the auto theft ripened or how, at the time of the prosecution, the State would not have been aware of the intent to steal.

307. 433 U.S. 682 (1977) (per curiam).

308. *Id.* at 682. The State conceded that proving all the elements of the underlying armed robbery was necessary to establish the earlier felony murder charge. *Id.* at 682 n.*.

309. 432 U.S. 137 (1977).

consolidated in a single prosecution.[310] In *Jeffers* the defendant, charged with two counts of conspiracy to distribute narcotics and with conducting a continuing criminal enterprise to violate the drug laws, successfully objected to the government's motion to consolidate the two indictments for trial. The defendant argued that much of the evidence admissible against his codefendants on the conspiracy charge would be inadmissible and prejudicial to his charge for continuing criminal enterprise. The four-justice plurality reasoned that because the defendant was responsible for the successive prosecutions he waived his double jeopardy claim against the subsequent prosecution.[311]

Similarly, in *Ohio v. Johnson*[312] the Court concluded that *Brown*'s rule against successive prosecutions for greater and lesser included offenses is not violated by trying a defendant for murder and aggravated robbery after the defendant has entered, over the State's objection, guilty pleas to the lesser included offenses of involuntary manslaughter and grand theft.[313] After accepting the pleas to the lesser included offenses, the trial court dismissed the greater charges because prosecution for the greater offenses would violate the Double Jeopardy Clause's protection against multiple punishments unauthorized by the legislature.[314] Assuming that the legislature had not intended cumulative punishments for these particular greater and lesser included offenses,[315] the issue of appropriate punishment could be addressed only after a finding of guilt on the greater offense.[316] The defendant, through his motion to dismiss, was responsible for the greater offenses' not being tried at the original trial; therefore, the Double Jeopardy Clause did not preclude subsequent prosecution for the greater offenses.[317]

b. The Same-Conduct Test

In *Brown*, *Harris*, and *Jeffers*, the Court used the basic *Blockburger*

310. *Id.* at 152-54 (plurality opinion).

311. *Id.* at 153-54. The plurality concluded that the defendant was not forced to choose between his right to a fair trial and his guarantee against double jeopardy. He could have avoided the prejudicial evidence by making a motion to sever his conspiracy charge from the conspiracy charges against his co-conspirators; thus, he still could have been tried in a single prosecution for his two offenses. *Id.* at 153 n.21.

312. 467 U.S. 493 (1984).

313. *Id.* at 494.

314. *Id.*

315. The Ohio Supreme Court had so concluded below. *Id.* at 496-99 (citing State v. Johnson, 453 N.E.2d 595 (Ohio 1983)).

316. *See id.* at 499-500 (stating that if the defendant were convicted for the greater offense, presumably he would be credited with the sentence received earlier on the lesser offenses).

317. *Id.* at 502.

approach to determine whether offenses charged in successive prosecutions were the same for purposes of the Double Jeopardy Clause. However, in *Illinois v. Vitale*[318] the Court indicated that *Blockburger* might not always be sufficient in the context of successive prosecutions.[319] The issue in *Vitale* was whether a conviction for "failing to reduce speed to avoid an accident" would preclude subsequent prosecution for an involuntary manslaughter charge arising out of the same accident.[320]

Failing to reduce speed to avoid an accident is not inherently a lesser included offense of involuntary manslaughter because the reckless operation of a motor vehicle in a manner likely to cause death—requisite to a conviction for involuntary manslaughter—may be established by conduct other than failure to reduce speed to avoid an accident.[321] If other evidence of reckless driving would suffice for manslaughter, then manslaughter and failure to reduce speed would not be the same offense under the *Blockburger* test because each offense would require proof of a fact that the other does not.[322]

Nonetheless, the Court found the *Blockburger* test inadequate to resolve the double jeopardy issue in *Vitale*. Proof of reckless driving by evidence of conduct other than failure to slow to avoid an accident presumably would not preclude a subsequent manslaughter prosecution. On the other hand, if the State had to establish the failure to slow in order to prove the reckless driving requisite to manslaughter, then the defendant would be prosecuted for conduct for which he had already been convicted; thus, "his claim of double jeopardy would be substantial."[323]

The suggestion in *Vitale* became the holding in *Grady v. Corbin*:[324]

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318. 447 U.S. 410 (1980).

319. *See id.* at 419.

320. *Id.* at 415-16. The Illinois trial court sustained the defendant's motion to dismiss the manslaughter prosecution based on Illinois's double jeopardy statute. The motion was granted before the State presented its evidence. *Id.* at 413-15.

321. *Id.* at 419. As the United States Supreme Court noted, the state supreme court had not addressed this possibility in its "rather cryptic remarks about the relationship between the two offenses." *Id.*

322. *Id.*

323. *Id.* at 420. The Court buttressed its dictum by noting the similarity to Harris v. Oklahoma, 433 U.S. 682 (1977): Because felony murder does not inevitably require proof of armed robbery, armed robbery and felony murder are not the same offense per *Blockburger*. Nonetheless, if armed robbery is the underlying felony that makes the homicide a felony murder, then the felony murder prosecution precludes a subsequent prosecution for the underlying felony charge of armed robbery. *Vitale*, 447 U.S. at 420-21.

324. 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993). A helpful discussion of *Grady* is in *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 149-58 (1990).

"We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[325]

The facts in *Grady* closely mirror those in *Vitale*. After an accident in which one person was killed and another injured, the defendant in *Grady* entered guilty pleas to misdemeanor charges of driving while intoxicated and failing to keep to the right of the median. Subsequently, the defendant was indicted for reckless manslaughter, second degree vehicular manslaughter, criminally negligent homicide for the killed victim, third degree reckless assault for the injured victim, and driving while intoxicated. The State's bill of particulars indicated that the State would establish the homicide and assault charges by proving the following reckless or negligent acts: (1) driving while intoxicated; (2) failing to keep to the right of the median; and (3) driving too fast for conditions.[326]

The New York Court of Appeals concluded that the defendant should have been granted his requested writ of prohibition barring prosecution on all counts in the indictment for two reasons. First, as a matter of state law, driving while intoxicated is a lesser included offense of second degree vehicular manslaughter.[327] The second and more significant reason was that the State's intent to rely on the prior traffic offenses to establish homicide and assault was barred by the "'pointed dictum'" in *Vitale*.[328]

Disregarding the second degree vehicular homicide charge, the defendant conceded that, according to the *Blockburger* test, the earlier traffic offenses were not the same offenses as the homicide and assault charges.[329] However, a crucial part of the Court's holding, and a source of major contention with the dissent,[330] is that the *Blockburger* test is only the first part in a two-step determination of whether two offenses are the same when prosecuted in successive trials.[331]

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325. *Grady*, 495 U.S. at 510.

326. *Id.* at 513-14.

327. *Id.* at 514.

328. *Id.* at 514-15 (citing Corbin v. Hillery, 543 N.E.2d 714, 719-20 (N.Y. 1989)).

329. *Id.* at 522. The State did not challenge the ruling of the New York Court of Appeals that *Blockburger* barred the second degree vehicular homicide charge, and that state law barred the driving while intoxicated charge. Thus, the only issue before the *Grady* Court was whether the Double Jeopardy Clause barred the assault and other homicide charges. *Id.* at n.13.

330. *Id.* at 527-30 (Scalia, J., dissenting).

331. *Id.* at 516. The Court noted that *Blockburger* serves only as a guide for statutory interpretation, primarily used to determine whether Congress intended multiple punishments for the same act when multiple charges are tried in a single prosecution. *Id.* at 517. The Court observed that none of the cases relied upon in Justice Scalia's dissent

The second step in the determination is that, even if the two offenses are not the same under *Blockburger*, "the Double Jeopardy Clause bars any subsequent prosecutions 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."[332] This second step is necessary, the Court reasoned, to serve the crucial Double Jeopardy Clause goal of protecting the defendant from repeated attempts to convict, which not only subject the defendant to prolonged anxiety and expense, but also give the State the opportunity to rehearse and improve its presentation.[333]

The Court emphasized that its new same-conduct test "is not an 'actual evidence' or 'same evidence' test."[334] Merely presenting evidence in one trial does not necessarily preclude the government from presenting the same evidence in a later trial.[335] Earlier in the same term, in *Dowling v. United States*,[336] the Court approved the introduction of *modus operandi* evidence in the defendant's bank robbery prosecution. Such evidence related to another armed offense of which the defendant had previously been acquitted.[337] Confusingly, however, the Court in *Grady* did not explain exactly how the results in the two cases were consistent—a point noted in both *Grady* dissents.[338]

The *Grady* Court recognized two exceptions to its same-conduct test. The same-conduct approach of *Grady* should not apply if, at the time of the initial prosecution, the additional facts requisite to the greater charge had not yet occurred, or had not been discovered despite the exercise of due diligence.[339] In *Grady*, because the accident victim was dead when the

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suggests that *Blockburger* is the exclusive definition of "same offense" in the context of successive prosecutions. *Id.* at 517 n.8.

332. *Id.* at 521.

333. *Id.* at 518-19.

334. *Id.* at 521.

335. *Id.* at 521-22.

336. 493 U.S. 342 (1990), *cited in Grady*, 495 U.S. at 522.

337. *Id.* at 348-52.

338. Justice O'Connor limited her solo dissent to a perceived inconsistency between the two cases. *Grady*, 495 U.S. at 524-26 (O'Connor, J., dissenting). She observed that the *modus operandi* evidence—wearing a ski mask during both crimes—that was used to establish identity in the second trial appeared to prove conduct for which the accused had been previously prosecuted. *Id.* at 525. Justice Scalia made the same point in his wider ranging dissent. *Id.* at 538-39 (Scalia, J., dissenting); *see also* United States v. Felix, 112 S. Ct. 1377 (1992) (reaffirming *Dowling* and *Grady*), *discussed infra* notes 349-364 and accompanying text.

339. *Grady*, 495 U.S. at 516 n.7. The Court described these exceptions by quoting Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977), including the reference to Diaz v. United

defendant pleaded guilty to the traffic offenses, the first exception did not apply. Likewise, the second exception did not apply in *Grady* because the trial judge's and the prosecutor's lack of awareness that the victim had died did not reflect the exercise of due diligence.[340]

Did *Grady v. Corbin* implement, as Justice Scalia maintained,[341] the same transaction joinder requirement urged by Justice Brennan in *Ashe v. Swenson*?[342] Justice Brennan's rule would require that all the charges springing from a single criminal transaction be joined into a single prosecution.[343] For example, in the *Ashe* poker game robbery, all charges would have to be tried in a single trial in order to serve the Double Jeopardy Clause by protecting against a defendant's being worn down by the powerful State's repeated prosecutions, in which the State would be able to rehearse and refine its presentation to a jury.[344] Justice Brennan, the author of the *Grady* opinion, denied that *Grady* implemented the same transaction joinder requirement. He noted that on remand the State would still be allowed to pursue the homicide prosecution if it could establish the requisite recklessness solely by proof of driving too fast for conditions—conduct for which the defendant had not previously been prosecuted.[345]

How likely was *Grady* to survive? Given the acerbic nature of the dissent[346] and that two members of the five-justice majority have been replaced,[347] *Grady*'s prognosis did not appear too good. *Grady*'s survival

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States, 223 U.S. 442, 448-49 (1912), in which the Court held that an earlier assault prosecution for the same conduct before the victim died did not foreclose a subsequent homicide prosecution.

340. One Assistant District Attorney (ADA) had been called to the accident scene and was notified later that evening when the victim died. Three days later another ADA started a homicide investigation, but never attempted to discover the date of the traffic charge trial and did not inform that court or the other ADA of the homicide investigation. The defendant entered guilty pleas to the traffic offenses twenty-four days after the accident and was sentenced twenty-one days later. At sentencing, the ADA, unaware of the fatality, recommended a minimum sentence. *Grady*, 495 U.S. at 511-13.

341. *Id.* at 527, 539-43 (Scalia, J., dissenting).

342. 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring), *discussed supra* notes 196-202 and accompanying text.

343. *See id.*

344. *Id.* at 457-60.

345. *Grady*, 495 U.S. at 523.

346. *Id.* at 542 (Scalia, J., dissenting) ("There are many questions here, and the answers to all of them are ridiculous.").

347. Justice Brennan, the author of the majority opinion, was replaced by Justice Souter, and Justice Marshall by Justice Thomas. In United States v. Dixon, 113 S. Ct. 2849 (1993), which overruled *Grady*, Souter voted to uphold the same-conduct test. Thomas supplied the crucial fifth vote to overrule. Because Justice White was one of the four dissenters in *Dixon*, his replacement by Justice Ginsburg should not affect *Dixon*'s

was especially dubious in light of the views of Chief Justice Rehnquist, one of the *Grady* dissenters, on stare decisis regarding constitutional decisions that he believes are "unworkable or are badly reasoned."[348]

Consequently, *United States v. Felix*,[349] the Court's first opportunity to reconsider *Grady*, was something of a surprise. The defendant in *Felix* had operated a methamphetamine (speed) lab in Oklahoma, but when the lab was shut down, he tried to set up another lab in Missouri. In the Missouri trial for attempting to set up the new lab, the government based its prosecution partly on the defendant's possession of the necessary chemicals and equipment. To establish criminal intent by possession, the government introduced evidence that the defendant had manufactured speed in Oklahoma. Felix was convicted by the Missouri court. Subsequently, he was prosecuted in Oklahoma for conspiracy to manufacture speed and for substantive drug offenses pursuant to the conspiracy. To support the substantive drug offenses in Oklahoma, the government introduced much of the same evidence that had been used in the earlier Missouri prosecution. Additionally, two of the overt acts supporting the conspiracy charge were based on the same conduct that had been prosecuted in Missouri. Again, Felix was convicted on all counts.[350] Affirming the convictions, the Court narrowed, but did not reverse, *Grady*.[351]

The evidence used to establish some of the substantive charges in Oklahoma was the same as that used to prove Felix's criminal intent in the earlier Missouri prosecution.[352] However, because the evidence in the Oklahoma trial was not evidence of *conduct* for which the defendant had been previously prosecuted in the Missouri trial, the Court distinguished *Grady*.[353] In *Grady* the Court eschewed any characterization of that decision as a "same evidence" test,[354] and the evidence against Felix was clearly admissible under *Dowling v. United States*.[355]

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vitality.

348. Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991). However, three of the five justices who joined Rehnquist's opinion for the Court in *Payne* subsequently evidenced more respect for stare decisis. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2796 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter, with Blackmun and Stevens).

349. 112 S. Ct. 1377 (1992).

350. *Id.* at 1379-81.

351. *See id.* at 1383-85. Relying on *Grady*, the Tenth Circuit Court of Appeals had reversed the convictions. *Id.* at 1381, *rev'g* 926 F.2d 1522 (10th Cir. 1991).

352. *Id.*

353. *Id.* at 1382.

354. *See supra* text accompanying note 334.

355. 493 U.S. 342 (1990), *cited with approval in Felix*, 112 S. Ct. at 1382; *see supra* text accompanying note 337.

However, the conspiracy count in *Felix* posed a much more serious *Grady* problem. Some of the evidence of overt acts in furtherance of the Oklahoma conspiracy was that Felix had attempted to set up a speed lab in Missouri, which was precisely the conduct for which he had been convicted in the earlier Missouri trial. Thus, the conspiracy prosecution appears vulnerable under *Grady*'s rule precluding a 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."[356] Nonetheless, the *Felix* Court sustained the conspiracy conviction, noting that "long antedating [*Grady v. Corbin* and the cases on which it relied], and not questioned in any of them, is the rule that a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes."[357]

The Court's rationale for the conspiracy exception to *Grady*'s same-conduct definition of same offense is one that the Court had employed previously. Definitions of "same offense" that are appropriate for double jeopardy purposes in the context of relatively simple crimes, such as car theft with its lesser included offense of joyriding,[358] and some form of involuntary manslaughter with lesser included traffic offenses,[359] are inappropriate for more complex statutory crimes, such as continuing criminal enterprises.[360] The conduct involved in a conspiracy is typically not simple, but is "multilayered . . . as to time and space."[361] While lesser included offense analysis may be "useful in the context of a 'single course of conduct,' [it] is . . . much less helpful in analyzing subsequent conspiracy prosecutions that are supported by previously prosecuted overt acts, just as it falls short in examining [continuing criminal enterprise] offenses that are based on previously prosecuted predicate acts."[362]

The net effect of *Felix* appeared to be: (1) that *Grady*'s same-conduct definition of same offense would remain in tact for relatively simple crimes; (2) that *Grady*'s same-conduct rule is definitely not a "same evidence" rule, so that *Dowling v. United States*[363] survives; and (3) that because *Grady*'s

356. Grady v. Corbin, 495 U.S. 508, 521 (1990), *quoted in Felix*, 112 S. Ct. at 1383, *and overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993).

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

358. *See* Brown v. Ohio, 432 U.S. 161 (1977).

359. *See Grady*, 495 U.S. 508; Illinois v. Vitale, 447 U.S. 410 (1980).

360. *See* Garrett v. United States, 471 U.S. 773, 789 (1985) (construing 21 U.S.C. § 848 (1988) (now codified at 21 U.S.C. §§ 859, 860, 861 (Supp. III 1991)), *cited in Felix*, 112 S. Ct. at 1385.

361. *Felix*, 112 S. Ct. at 1385 (citing *Garrett*, 471 U.S. at 789).

362. *Id.* (citing *Garrett*, 471 U.S. at 789).

363. 493 U.S. 342 (1990); *see supra* notes 336-338 and accompanying text.

same-conduct test is not applicable to the complex crime of conspiracy, it probably would be held inapplicable to other complex crimes.[364]

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364. An example of a complex crime is engaging in a continuing criminal enterprise (CCE), 21 U.S.C. § 848 (1988). A person engages in a CCE by committing certain drug offenses when "such violation is a part of a continuing series of violations . . . which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management." 21 U.S.C. § 848 (c)(2).

In Garrett v. United States, 471 U.S. 773 (1985), the Court concluded that the Double Jeopardy Clause did not prohibit the government from using a criminal act, of which the defendant had previously been convicted, as evidence that a subsequent crime was a part of a continuing series of violations in order to convict the defendant of engaging in a CCE. *Id.* at 794-95. *Garrett* predates *Grady*'s same-conduct definition of same offense, and the result in *Garrett* appears to conflict with a literal application of *Grady* barring the use of evidence of conduct for which the defendant has been previously prosecuted. *See Grady*, 495 U.S. at 521. Nonetheless, the *Felix* Court's reliance on *Garrett* as support for the conclusion that *Grady*'s same-conduct rule is inapplicable to conspiracy prosecutions strongly suggests that the same-conduct rule would have been inapplicable to CCE prosecutions as well. *See Felix*, 112 S. Ct. at 1385.

Another significant complex crime that posed substantial double jeopardy problems in light of *Grady*'s same-conduct rule is Title IX of the Organized Crime Control Act of 1970, known as the Racketeer Influenced and Corrupt Organization Act (RICO). 18 U.S.C. §§ 1961-1968 (1988 & Supp. III 1991). Substantial literature describing various aspects of RICO is available. A useful introduction to RICO is available in Stephen D. Brown & Alan M. Lieberman, *RICO Basics: A Primer*, 35 VILL. L. REV. 865 (1990). For a comprehensive critique of the statute, see Gerard E. Lynch, *RICO: The Crime of Being a Criminal* (pts. 1-4), 87 COLUM. L. REV. 661 (1987), 87 COLUM. L. REV. 920 (1987); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988); Gerard E. Lynch, *A Reply to Michael Goldsmith*, 88 COLUM. L. REV. 802 (1988). The RICO/Grady v. Corbin double jeopardy issue is analyzed in Ramona L. McGee, Note, *Criminal RICO and Double Jeopardy Analysis in the Wake of* Grady v. Corbin: *Is this RICO's Achilles' Heel?*, 77 CORNELL L. REV. 687 (1992), and Theresa L. Kruk, Annotation, *Double Jeopardy Defense to Separate or Successive Prosecutions Under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C.S. § 1962)*, 108 A.L.R. FED. 594 (1992).

The basis of the substantive RICO offense involves deriving income from a pattern of racketeering activity, using that income in certain ways, or using a pattern of racketeering activity to achieve certain ends. 18 U.S.C. § 1962 (1988). A pattern of racketeering activity is "at least two acts of racketeering activity, one of which occurred . . . within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Racketeering activity includes nine state substantive offenses—murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and dealing in narcotics—as well as thirty-five separate federal offenses. *See* 18 U.S.C. § 1961(1) (Supp. III 1991). The government must prove the existence of at least two of the enumerated offenses, known as "predicates," to establish the pattern of racketeering activity requisite to a RICO violation.

At the end of the October 1992 term, *Grady v. Corbin*[365] was overruled by *United States v. Dixon*.[366] Resolving the only question on which certiorari had been granted, the *Dixon* Court first held that the Double Jeopardy Clause is applicable to criminal contempt proceedings.[367] Then, by a five-to-four vote the Court rejected *Grady*'s same-conduct test as confusing and historically insupportable.[368]

Dixon consists of two consolidated cases. In the first case, Alvin Dixon was released on bail under the condition that he not commit "any criminal offense" pending his trial for second degree murder. Subsequently, he was arrested and indicted for possessing cocaine with intent to distribute and was found guilty of criminal contempt for violating the condition of his release by having possessed the drugs with intent to distribute them. The trial court later dismissed the cocaine indictment on double jeopardy grounds.[369]

In the second case, Michael Foster's wife, Ana Foster, secured a civil protection order (CPO) requiring him not to "molest, assault, or in any manner threaten or physically abuse" her.[370] Subsequently, she filed motions to have him held in contempt for numerous violations of the CPO including, among others, threats on dates *a*, *b*, and *c* and assaults on dates *d* and *e*, the assault on the latter date being particularly severe. At a hearing prosecuted by Ana Foster's counsel, the court informed her that she must "'prove as an element, first that there was a Civil Protection Order, and

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The *Grady* double jeopardy issue is readily apparent. A literal application of the same-conduct rule would bar a RICO prosecution if one or more of the predicate offenses represents conduct for which the defendant has previously been prosecuted. However, given the Court's reliance on *Garrett*, the pre-*Grady* CCE case, to justify the conspiracy exception to the same-conduct rule in *Felix*, it seems likely that the Court would again limit the same-conduct rule to relatively simple crimes and find no *Grady* barriers to a RICO prosecution.

At least one commentator suggests this outcome. *See* McGee, *supra*, at 722. McGee observes that a RICO sequence in which the RICO violation is prosecuted first and the predicate offenses later, would not appear to pose same-conduct rule problems. *Id.* at 716. McGee's conclusion is supported by the Court's subsequent decision in *Felix* that the Double Jeopardy Clause does not bar prosecution for conduct, evidence of which had been admitted in an earlier trial to establish an element of some other offense. *See Felix*, 112 S. Ct. at 1382-83.

365. 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993).

366. 113 S. Ct. 2849 (1993).

367. *Id.* at 2855-56; *see supra* note 100 and accompanying text.

368. *Dixon*, 113 S. Ct. at 2860. This part of Justice Scalia's opinion was joined by Chief Justice Rehnquist and by Justices O'Connor, Kennedy, and Thomas. *Id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part).

369. *Id.* at 2853.

370. *Id.* at 2854.

then [that] . . . the assault as defined by the criminal code, in fact occurred.'"[371] Michael Foster was acquitted of contempt on, among other counts, the threats on dates *a*, *b*, and *c* and convicted of contempt on, among other counts, the assaults on dates *d* and *e*. Later he was indicted for threatening to injure or kidnap on dates *a*, *b*, and *c*, simple assault on date *d*, and assault with intent to kill on date *e*. The trial court denied his double jeopardy claim.[372]

The District of Columbia Court of Appeals consolidated Michael Foster's appeal with the government's appeal in *Dixon*. Relying on *Grady*, the court of appeals held that both subsequent prosecutions were barred by the Double Jeopardy Clause.[373]

Having concluded that the Double Jeopardy Clause applies to criminal contempt proceedings, the Court had to determine whether the subsequent prosecutions were for the same offenses as those in the contempt prosecutions. Because the same conduct—Dixon's possession of cocaine with intent to distribute, and Foster's threats and assaults—was involved in the two sets of prosecutions, the Court noted that *Grady*'s same-conduct test dictated a finding of double jeopardy.[374] However, the Court decided to overrule the three-year-old case.[375]

Justice Scalia, speaking for five members of the Court, and Justice Souter, speaking for four,[376] differed sharply over the existence of precedent supporting the same-conduct test. Much of their disagreement focused on *In re Nielsen*,[377] which Scalia characterized simply as a *Blockburger v. United States*[378]-type case in which prosecution for a greater offense was held to bar subsequent prosecution for a lesser included offense.[379]

Souter insisted that Scalia overlooked the fact that the subsequent prosecution in *Nielsen* was not for a lesser included offense because the later charged offense contained an additional element that the offense in the first prosecution did not.[380] Consequently, although the subsequent prosecution

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371. *Id.*

372. *Id.*

373. *Id.* (citing United States v. Dixon, 598 A.2d 724, 725 (D.C. Ct. App. 1991)).

374. *Id.* at 2859-60.

375. *Id.* at 2860.

376. While only Justice Stevens joined Justices Souter's opinion, both Justices White and Blackmun indicated their agreement with Souter's conclusion. *Id.* at 2869 (White, J., concurring in the judgment in part and dissenting in part); *id.* at 2880 (Blackmun, J., concurring in the judgment in part and dissenting in part).

377. 131 U.S. 176 (1889).

378. 284 U.S. 299 (1932).

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

380. *Id.* at 2884-86 (Souter, J., concurring in the judgment in part and dissenting in part).

would have been allowed under *Blockburger*, the *Nielsen* Court must have been using a same-conduct-type test to find the later prosecution barred.[381] The two justices also disagreed about whether *Grady*'s same-conduct test had proved confusing and difficult to apply.[382]

The crux of Souter's opinion is that, while the *Blockburger* test serves well as a guide to legislative intent about the authorization for multiple punishments in a single prosecution, it is sometimes inadequate to provide necessary protection against successive prosecutions, "the central protection provided by the Clause."[383]

He demonstrated *Blockburger*'s inadequacy with a hypothetical of a one's having committed an armed robbery in a dwelling.[384] Three related offenses might be charged: simple robbery, robbery in a dwelling, or armed robbery. Simple robbery is a lesser included offense of the other two. However, both robbery in a dwelling and armed robbery contain an element that the other does not. Consequently, *Blockburger* would allow a prosecution for either one of them followed by a separate prosecution for the other, even though based on the same act of robbery. Souter argued that the second prosecution, which would be barred by the same-conduct test, would undermine the central purpose of the Double Jeopardy Clause of guarding against successive prosecutions which give the government the opportunity to rehearse its case and to wear down the defendant.[385]

Scalia offered an example based on an eighteenth-century English case to demonstrate that under the common law a subsequent prosecution has never been barred if the two prosecutions involved offenses each of which requires proof of an element that the other does not.[386] Scalia did not address Souter's concern that the subsequent prosecution in such a case may

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381. *See id.* at 2887. In *Nielsen* the defendant, a Mormon, was first convicted of cohabiting with more than one woman and was later prosecuted for adultery. Scalia read *Nielson* as assuming that adultery was an element of cohabitation, so that the former crime was a lesser included offense of the latter. *Dixon*, 113 S. Ct. at 2860-61.

Souter read *Nielson* as recognizing that adultery required proof that one of the partners was married to another person, while this requirement was not an element of cohabitation. Because both adultery and cohabitation required proof of an element that the other did not, the former was not a lesser included offense of the later. *Id.* at 2884-86 (Souter, J., concurring in the judgment in part and dissenting in part).

Justices Scalia and Souter also disagreed about the significance of more modern cases, especially Brown v. Ohio, 432 U.S. 161 (1977), and Harris v. Oklahoma, 433 U.S. 682 (1977). *See Dixon*, 113 S. Ct. at 2861; *id.* at 2887 (Souter, J.).

382. *Dixon*, 113 S. Ct. at 2864 n.16; *id.* at 2889 (Souter, J.).

383. *Id.* at 2882.

384. *Id.* at 2883-84.

385. *Id.* at 2884.

386. *Id.* at 2863 (citing The King v. Vandercomb, 168 Eng. Rep. 455, 468 (K.B. 1796)).

undercut the Double Jeopardy Clause's "central protection."

Dixon might be thought to smooth the troubled waters of double jeopardy by eliminating *Grady*'s same-conduct test in favor of the easier to apply, same-elements test of *Blockburger*. To the contrary, *Dixon* roils these waters.

In order even to get to the issue of *Grady*'s same-conduct test, the *Dixon* Court had to apply the *Blockburger* test to the facts of the case. When it did, Scalia lost his five-vote majority. While all five agreed that *Blockburger* did not bar the subsequent prosecution of four of the counts against Foster, only Justice Kennedy agreed with Scalia that *Blockburger* barred prosecution of the other count against Foster and the sole count against Dixon. Indeed, writing for the three justices who abandoned that part of Scalia's opinion, Chief Justice Rehnquist noted that "Justice Scalia's double-jeopardy analysis bears a striking resemblance to that found in *Grady*—not what one would expect in an opinion that overrules *Grady*."[387]

Scalia observed that Dixon's court order enjoined Dixon from committing any offense in the entire governing criminal code. Dixon was found guilty of contempt only on proof that he had committed an offense, specifically possession of cocaine with intent to distribute. Scalia then reasoned that the substantive drug offense became "'a species of lesser-included offense'" of the contempt offense because each element of the substantive drug offense was included in the contempt offense.[388]

Similarly, Foster's contempt conviction for violating the civil protection order forbidding him from committing assault precluded a subsequent prosecution for simple assault because each element of the simple assault offense was included in the earlier contempt prosecution.[389]

Conversely, Scalia reasoned, *Blockburger* does not bar subsequent prosecution of the other counts against Foster. Applying the same-elements test in a technical manner, Scalia noted that Foster had been ordered not to "'molest, assault, or in any manner threaten or abuse' his wife."[390] A contempt conviction required proof of a willful violation of the CPO, the elements of which were knowledge of the CPO and violation of one of its

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387. *Id.* at 2867 (Rehnquist, C.J., concurring in part and dissenting in part) (joined by Justices O'Connor and Thomas).

388. *Id.* at 2857 (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)) (discussing Harris v. Oklahoma, 433 U.S. 682 (1977)).

389. *Id.* at 2858. Although only Justice Kennedy joined this part of Scalia's opinion, all four of the justices who voted not to overrule *Grady* agreed that the Double Jeopardy Clause precluded the subsequent prosecution of Dixon for the drug offense and Foster for simple assault. Of course these four disagreed with Scalia as to the other counts against Foster, which they found to be barred; however, Scalia, this time writing for five members of the Court, did not.

390. *Id.* at 2858.

provisions—*e.g.*, giving a threat. The elements of the subsequently prosecuted offense, threats to injure or kidnap, required the specific element that the threat be of a particular type. Thus, the offenses of contempt and threat to injury or kidnap each contain an element that the other does not; the former requires knowledge of the CPO, and the latter, that the threat be to injure or kidnap. Consequently, the successive prosecutions are not barred by *Blockburger*.[391]

Similarly, the earlier contempt prosecution for violation of the CPO against assault is not the same offense as, and would not bar a subsequent prosecution for, assault with intent to kill. The former requires proof of knowledge of the CPO, and the latter, proof of the intent to kill.[392]

Justice White, writing for himself and Justice Stevens on this point, characterized Scalia's analysis of the non-jeopardy-barred offenses as formalistic and "divorced from the purposes of the constitutional provision he purports to apply."[393] White argued that the basic purpose of the Double Jeopardy Clause is to protect a defendant from having to defend himself twice on the same charge.[394]

Justice Souter, joined by Justice Stevens, found all of the subsequent charges barred under *Grady*'s same-conduct test.[395]

Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, disagreed with Scalia about the impact of *Blockburger* on Dixon's subsequent drug prosecution and on Foster's subsequent simple assault prosecution. Rehnquist found neither of them barred. He asserted that proper *Blockburger* analysis requires a court to focus on the elements of contempt in the ordinary sense, and not on the terms of the particular court orders involved: "Because the generic crime of contempt of court has different elements than the substantive criminal charges in this case, I believe that they are separate offenses under *Blockburger*."[396] Rehnquist complained that Scalia's focus on the facts necessary to show a violation of the specific court orders, rather than on the generic elements of the crime of contempt of court, is really a type of quasi-*Grady* analysis.[397]

The net effect of *Dixon* is that *Grady* has been overruled, leaving *Blockburger* as the sole test of same offense for successive prosecutions, as well as for multiple punishments in a single prosecution. How *Blockburger* is to be applied in successive prosecution cases, however, appears far from

391. *Id.* at 2858-59.
392. *Id.* at 2859.
393. *Id.* at 2874 (White, J., concurring in the judgment in part and dissenting in part).
394. *Id.* at 2876.
395. *Id.* at 2890-91 (Souter, J.).
396. *Id.* at 2865. (Rehnquist, C.J., concurring in part and dissenting in part).
397. *Id.* at 2866-67.

settled. To what extent must the facts and elements of the crime charged in the earlier prosecution be considered? *Grady*'s same-conduct test had afforded some guidance here; the split opinions in *Dixon* do not.

2. *South Carolina Cases*

The application of the Fifth Amendment's Double Jeopardy Clause to the states in *Benton v. Maryland*[398] did not alter South Carolina's traditional interpretation that "the provisions against double jeopardy apply only to a second prosecution for the same act and crime, both in law and fact, for which the first prosecution was instituted."[399] The test was "whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first indictment."[400]

Prior to 1986 the South Carolina courts, relying on *Blockburger v. United States*[401] and *Brown v. Ohio*[402] as additional guides, implemented the *Hoffman* test to invalidate subsequent prosecutions for lesser included offenses of crimes for which defendants had already been tried,[403] and to uphold successive prosecutions when the two offenses have different elements.[404]

Prior to *Brown* the South Carolina Supreme Court had observed a rule that conviction of a lesser included offense in a court of limited jurisdiction would not bar subsequent prosecution in a court of general sessions for a greater offense that was beyond the jurisdiction of the former court.[405] The

398. 395 U.S. 784 (1969).

399. State v. Hill, 254 S.C. 321, 326, 175 S.E.2d 227, 230 (1970) (sustaining a conviction for assault and battery of a high and aggravated nature following an earlier municipal court conviction of disorderly conduct based on the same facts).

400. State v. Hoffman, 257 S.C. 461, 466, 186 S.E.2d 421, 423 (1972) (sustaining a conviction for failure to stop for a flashing light following municipal court acquittals of creating excessive noise in the operation of a motorcycle and of operating a motorcycle too fast for conditions).

401. 284 U.S. 299 (1932).

402. 432 U.S. 161 (1977).

403. *See* State v. Dunbar, 282 S.C. 169, 171, 318 S.E.2d 16, 18 (1984) (dictum) (stating that acquittal of housebreaking would preclude subsequent prosecution for the lesser included offense of entering without breaking).

404. *See* State v. Norton, 286 S.C. 95, 96-97, 332 S.E.2d 531, 532-533 (1985) (holding that acquittal for first degree criminal sexual conduct with a minor is not a bar to subsequent prosecution for lewd acts on a minor, because each offense requires proof of a fact that the other does not).

405. *See* State v. Butler, 230 S.C. 159, 94 S.E.2d 761 (1956) (holding that conviction in municipal court of illegally firing a shotgun did not bar subsequent prosecution for assault and battery with intent to kill), *overruled by* State v. Grampus, 288 S.C. 395, 397

court has also noted the traditional rule that "only one prosecution is permissible for a continuing offense."[406] Moreover, the court has taken care to determine whether an activity charged as a separate conspiracy was in fact part of another conspiracy for which the defendant had already been prosecuted.[407]

Anticipating the holding in *Grady v. Corbin*,[408] in 1986 in *State v. Grampus*[409] the South Carolina Supreme Court adopted a test similar to the same-conduct definition of same offense when dealing with successive prosecutions. Relying on the dictum in *Illinois v. Vitale*,[410] the *Grampus* court concluded that a felony driving-under-the-influence (DUI) prosecution was precluded by an earlier magistrate court conviction for improper lane change arising from the same accident.[411] Evidence of the improper lane change, conduct for which the defendant had already been prosecuted, was crucial to establishing an essential element of felony DUI: that while driving under the influence, the defendant did an act forbidden by law which caused injury or death to another person.[412] The defendant's conviction for improper lane change could not be used to establish an element of felony DUI because doing so would subject the defendant to double jeopardy. In other words, the improper lane change caused the head-on collision.[413]

Why the court elected to implement the same-conduct test some six years after *Vitale* is unclear. Just one year before *Grampus*, the court affirmed a successive prosecution that the same-conduct test would have prohibited.[414] At any rate, after 1986 the same-conduct test was well established in South Carolina.[415] Post-*Grady*, pre-*Dixon* South Carolina cases have naturally relied on *Grady*.[416]

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n.3, 343 S.E.2d 26, 27 n.3 (1986).

406. State v. Hess, 279 S.C. 525, 529, 309 S.E.2d 741, 743 (misconduct in office), *cert. denied*, 464 U.S. 995 (1983).

407. *See* State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982).

408. 495 U.S. 508 (1990).

409. 288 S.C. 395, 343 S.E.2d 26 (1986).

410. 447 U.S. 410, 419-21 (1980).

411. *Grampus*, 288 S.C. at 396-97, 343 S.E.2d at 26-27.

412. S.C. CODE ANN. § 56-5-2945 (Law. Co-op. 1991).

413. *Grampus*, 288 S.C. at 397, 343 S.E.2d at 27.

414. *See* State v. Norton, 286 S.C. 95, 332 S.E.2d 531 (1985).

415. *See, e.g.*, State v. Carter, 291 S.C. 385, 353 S.E.2d 875 (1987) (holding that a DUI conviction in magistrate's court should have precluded subsequent prosecution for reckless homicide based on the same conduct).

416. *See, e.g.*, State v. Magazine, 302 S.C. 55, 58, 393 S.E.2d 385, 386 (1990) (holding that a criminal contempt sanction precludes subsequent prosecution for assault and battery of a high and aggravated nature). For a discussion of the distinction between civil and criminal contempt, see *supra* notes 94-98 and accompanying text.

Relying on *Grady v. Corbin* and *United States v. Felix*,[417] the court in *State v. Owens*[418] concluded that a prior kidnapping conviction did not preclude a subsequent prosecution for murdering the kidnapped victim.[419] As was observed in *Felix*, *Grady* does not necessarily preclude using the same evidence in successive prosecutions.[420] Furthermore, as the *Owens* court noted, kidnapping is not an essential element of murder.[421] Finally, important evidence in the murder prosecution in *Owens*—the defendant's inculpatory statements made to fellow inmates—did not exist prior to the kidnapping trial.[422]

The South Carolina Supreme Court most recently addressed the same-conduct test in *State v. Wilson*,[423] concluding that a prior acquittal on a charge of cocaine trafficking did not bar a subsequent conviction of marijuana trafficking. Employing a technically correct *Grady*-type analysis, the court found that the conduct in the earlier cocaine case was not used to establish an element of the later marijuana case.[424]

The two appellants in *Wilson*, Walter and Steve, father and son, were originally indicted in the cocaine case with two other family members, Ronnie and Teresa. At the same time, Ronnie and Teresa were also indicted for trafficking more than 100 pounds of marijuana. Ronnie and Teresa were found guilty on both trafficking counts. Only after Walter and Steve were acquitted on the cocaine trafficking charge were they indicted for trafficking more than 100 pounds of marijuana along with Ronnie, Teresa, and others who had also been charged with Ronnie and Teresa in the earlier marijuana indictment.[425]

As both the concurring[426] and dissenting[427] justices in *Wilson* emphasized, the crux of the double jeopardy issue depends upon whether the

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As discussed previously, the United States Supreme Court recently decided that the Double Jeopardy Clause applies to non-summary criminal contempt prosecutions. United States v. Dixon, 113 S. Ct. 2849, 2856 (1993); *see supra* note 100.

417. 112 S. Ct. 1377 (1992).

418. 424 S.E.2d 473 (S.C. 1992).

419. *Id.* at 475-76.

420. *Felix*, 112 S. Ct. at 1382-83, *cited in Owens*, 424 S.E.2d at 475.

421. *Owens*, 424 S.E.2d at 476.

422. *Id.*

423. 429 S.E.2d 453 (S.C. 1993).

424. *Id.* at 454-55. The court also found no collateral estoppel violation, as per Ashe v. Swenson, 397 U.S. 432 (1970), although the court did not discuss what might have prompted the acquittal in the earlier cocaine trafficking trial. *Wilson*, 429 S.E.2d at 456. *Ashe* is discussed *supra* notes 196-202 and accompanying text.

425. *Wilson*, 429 S.E.2d at 453-54.

426. *Id.* at 457 (Toal, J., concurring).

427. *Id.* at 459 (Finney, J., dissenting).

drug trafficking involved two conspiracies or only one. If the trafficking in cocaine and marijuana were part of a single conspiracy to engage in drug trafficking, then the Double Jeopardy Clause would bar Walter's and Steve's second prosecution.[428] The majority recognized the issue, but treated it as a matter of pleading, noting that "in *Dasher* the defendants were charged in both prosecutions with a general conspiracy to violate the Controlled Substances Act."[429] In contrast, *Wilson* concerned a cocaine trafficking conspiracy[430] charge followed by a marijuana trafficking conspiracy[431] charge. Because "[e]ach conspiracy offense is statutorily defined by what controlled substance is the object of the agreement[, t]he State . . . has alleged two separate conspiracies requiring different proof."[432]

Justice Toal observed that under the majority's analysis, if two persons agreed to import two different drugs, but did nothing else, each could face a conspiracy charge for one drug, followed by another prosecution for a conspiracy regarding the other drug.[433] Similarly, according to the majority's analysis, an agreement to break into a house and steal something could support serial prosecutions for each thief for two separate conspiracies because each conspiracy would be defined by a separate code offense. Yet, in both hypotheticals there is only a single conspiracy.

Justice Toal concluded that on the facts of *Wilson* two separate conspiracies had occurred. Consequently, she concurred in the result reached by the majority, that the marijuana charge was not barred by the Double Jeopardy Clause.[434] Justice Finney dissented, finding a single conspiracy involving the same key principals and overlapping dates, as in *Dasher*.[435]

In *State v. Amerson*,[436] a conspiracy case decided the same day as *Wilson*, the court affirmed the trial court's conclusions that a prosecution for conspiracy to traffic marijuana was barred by an earlier acquittal in another marijuana trafficking conspiracy case. Justice Toal, writing for a unanimous court, emphasized that the essence of a conspiracy is the agreement and that the agreement is typically established by proof of overt acts committed in furtherance of the conspiracy.[437] Because a single conspiracy can be

428. *See* State v. Dasher, 278 S.C. 454, 456, 298 S.E.2d 215, 217 (1982).
429. *Wilson*, 429 S.E.2d at 455.
430. S.C. CODE ANN. § 44-53-370(e)(2)(e) (Law. Co-op. Supp. 1992).
431. S.C. CODE ANN. § 44-53-370(e)(1)(b).
432. *Wilson*, 429 S.E.2d at 455-56.
433. *Id.* at 458 (Toal, J., concurring).
434. *Id.* at 456.
435. *Id.* at 459 (Finney, J., dissenting).
436. 428 S.E.2d 871 (S.C. 1993).
437. *Id.* at 873.

established by different aggregations of proof, a single conspiracy might appear to be several conspiracies.[438] Applying a multi-pronged, flexible, totality of the circumstances test,[439] the court affirmed the trial court's findings that a single conspiracy had occurred and that the Double Jeopardy Clause thus barred the second prosecution.[440]

In *State v. Jeffries*[441] the South Carolina Court of Appeals concluded that a prosecution for willful abandonment of a child did not preclude a subsequent kidnapping prosecution when the kidnapper stole a car with an infant in the back seat and later left the infant behind a store. The court reasoned that kidnapping is not a continuing offense and that freeing the victim, the conduct involved in the earlier abandonment charge, is not an essential element of kidnapping.[442]

The Double Jeopardy Clause is not violated by prosecution for conduct which happens to coincide with other conduct that was the subject of an earlier prosecution. Thus, in *State v. Clarke*[443] an acquittal for improper lane change did not preclude a subsequent prosecution for unlawful possession of a pistol that the police officer observed during the traffic stop.[444] Nor is double jeopardy imposed by successive prosecutions for separate violations of the same or related statutes.[445]

In *State v. Johnson*[446] the court applied the same-conduct test in a rather technical manner to conclude that a prosecution under the Habitual Traffic Offender Act (HTO)[447] is not barred by an earlier trial for driving

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438. *Id.* (citing United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988)).

439. *Id.* The *Amerson* court stated:

> The factors considered are (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.

Id. (citing *Ragins*, 840 F.2d 1184).

440. *Id.* at 873-74.

441. 304 S.C. 141, 403 S.E.2d 169 (Ct. App. 1991), *vacated on other grounds*, 112 S. Ct. 1464 (1992).

442. *Id.* at 145, 403 S.E.2d at 171.

443. 302 S.C. 423, 396 S.E.2d 827 (1990).

444. *Id.* at 436, 396 S.E.2d at 828.

445. *See, e.g.*, State v. Dowey, 307 S.C. 69, 413 S.E.2d 848 (Ct. App. 1992) (concluding that a cocaine trafficking prosecution was not precluded by earlier conviction for possession of cocaine with intent to distribute when based on different instances of conduct).

446. 299 S.C. 130, 382 S.E.2d 909 (1989) (per curiam).

447. S.C. CODE ANN. § 56-1-1100 (Law. Co-op. 1991).

under suspension (DUS).[448] HTO involves driving while one's license is suspended by the Highway Department, but DUS requires driving while prohibited by judgment of a court.[449] Regardless of what governmental entity was responsible for revoking the defendant's authority to drive, the HTO offense seems to involve conduct—driving a vehicle without proper authority—for which the defendant had been previously prosecuted.

In neither *Vitale* nor *Grady* was each element of the subsequent homicide prosecution encompassed within the earlier traffic offense charge.[450] The touchstone of the same-conduct test is that if *any* essential element of the subsequent offense depends upon proof of conduct for which the defendant has already been prosecuted, the latter charge is barred.[451] However, if each and every element of the subsequent charge must be encompassed in the conduct prosecuted in the earlier charge, then the court is actually applying a *Blockburger* same-elements test, not a *Grady* same-conduct test.

Will the South Carolina Supreme Court abandon the same-conduct test following *Grady*'s demise? Given that South Carolina adopted this test some four years before *Grady* was decided,[452] and in order to reduce turbulence in this area of the law,[453] the same-conduct test might be retained as a function of South Carolina law.[454] The answer will depend on how important the South Supreme courts determine the test is in serving the underlying purposes of the protection against double jeopardy.[455]

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448. S.C. CODE ANN. § 56-1-460.

449. *Johnson*, 299 S.C. at 132, 382 S.E.2d at 910. As a pre-*Grady* case, *Johnson* relied on Illinois v. Vitale, 447 U.S. 410 (1980), as well as the earlier South Carolina cases of State v. Grampus, 228 S.C. 395, 343 S.E.2d 26 (1980), and State v. Carter, 291 S.C. 385, 353 S.E.2d 875 (1987).

450. *See supra* text accompanying note 318 (discussing *Vitale*); *supra* text accompanying note 324 (discussing *Grady*).

451. *See supra* text accompanying notes 332-333.

452. *See Grampus*, 288 S.C. 395, 343 S.E.2d 26. An attorney's advice on double jeopardy given in 1989, after *Grampus*, but before *Grady*, was held to be ineffective assistance of counsel for not encompassing the same-conduct rule. Jivers v. State, 304 S.C. 556, 560, 406 S.E.2d 154, 156-57 (1991).

453. In adopting the same-conduct test, *Grampus* overruled State v. Butler, 230 S.C. 159, 94 S.E.2d 761 (1956).

454. The court in *Grampus* relied on the Fifth Amendment as construed in dictum in Illinois v. Vitale, 447 U.S. 410, 421 (1980), but did not mention the state constitution's double jeopardy provision, S.C. CONST. art. I, § 12. Since the Fifth Amendment's Double Jeopardy Clause was held applicable to the states in 1969, the South Carolina Supreme Court has not interpreted the state's double jeopardy provision in a manner independent from that of the Fifth Amendment. *See supra* text accompanying notes 45-47.

455. In his dissenting opinion in *Dixon*, Justice Souter forcibly presented the

The same-conduct test does have costs for law enforcement. Moreover, coordinating prosecutions in magistrates courts and general sessions courts is imperative to ensure that the trials of petty misdemeanors do not preclude subsequent serious felony trials.[456] Additionally, the same-conduct test would appear to annul the statutory authorization for reindictment and trial following an acquittal based on a variance between indictment and proof.[457]

VI. REPROSECUTION FOLLOWING MISTRIAL

A. Introduction

In addition to precluding retrial following acquittal or conviction for the same offense, the Double Jeopardy Clause protects the defendant's "'valued right to have his trial completed by a particular tribunal.'"[458] Because jeopardy attaches before a judgment becomes final,[459] a defendant whose prior prosecution was terminated without either conviction or acquittal faces double jeopardy upon retrial. Determining when the subsequent trial violates the Double Jeopardy Clause under such circumstances is the subject of this Part of the Article.

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importance of the same-conduct test in serving these underlying purposes in the context of the Fifth Amendment. United States v. Dixon, 113 S. Ct. 2849, 2890 (1993) (Souter, J., concurring in judgment in part and dissenting in part); *see supra* text accompanying notes 383-385.

456. As the Court noted in Grady v. Corbin, 495 U.S. 508, 516 n.7 (1990), *overruled by Dixon*, 113 S. Ct. 2849, an exception to the same-conduct rule might apply if the prosecution exercised due diligence, but was unaware, at the time of the initial trial on the lesser offense, of the existence of facts that would constitute the greater offense. *See supra* notes 339-340 and accompanying text. In this regard it is interesting to note that in *Grampus*, 288 S.C. 395, 343 S.E.2d 26, in which the court adopted the same-conduct rule, defendant's counsel suggested to the solicitor's office that the traffic citations and the felony DUI charge be pursued in the same trial. However, because the charges were prosecuted in different trials, the *Grampus* court held that the trial for the former charges invalidated the conviction for the latter charges. *Id.* at 396, 343 S.E.2d at 26.

457. S.C. CODE ANN. § 17-23-30 (Law. Co-op. 1985); *see supra* notes 187-195 and accompanying text. In State v. Gowan, 178 S.C. 78, 182 S.E. 159 (1935), the court directed a verdict of not guilty because of a variance between proof and indictment as to the location of the murder victim's demise, after which the defendant was reindicted and convicted. The *Gowan* court rejected the plea of *autrefois acquit*. *Id.* at 81, 182 S.E. at 160. Under the same-conduct test the defendant could not have been tried again for having inflicted the mortal blow.

458. United States v. Jorn, 400 U.S. 470, 484 (1971) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

459. *See supra* text accompanying notes 48-51.

The Court has explained why this "valued right" merits constitutional protection:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.[460]

The last concern enumerated in this quotation arises from the State's opportunity to perfect its presentation of evidence, treating the earlier aborted proceeding as a dress rehearsal.[461] A related concern is that a prosecutor, sensing that the State's case is proceeding poorly, might move for a mistrial in order to avoid potential acquittal.[462]

Because the defendant's right to have the trial completed by the first tribunal is necessarily frustrated by retrial following an involuntary mistrial, the prosecutor must justify the mistrial in order to avoid the Double Jeopardy Clause's bar to the subsequent prosecution.[463] The mistrial is justified if "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[464]

B. Voluntary and Consensual Mistrials

The manifest-necessity standard for mistrials[465] is inapplicable when the mistrial is granted at the defendant's request or with his consent.[466]

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460. Arizona v. Washington, 434 U.S. 497, 503-04 (1978) (footnotes omitted).

461. *Cf.* Ashe v. Swenson, 397 U.S. 436, 447 (1970) (holding that collateral estoppel precluded a subsequent prosecution for armed robbery of one victim following acquittal on a robbery charge of another victim during the same hold-up; the State conceded that it had treated the first trial as a dry run for the second).

462. *See* Downum v. United States, 372 U.S. 734 (1963) (prosecutor requested mistrial when important witnesses whom he had been unable to subpoena failed to appear).

In tracing the evolution of double jeopardy jurisprudence from the common-law rule against the discharge of juries to the protection of the Double Jeopardy Clause, Justice Powell noted the importance of the common-law rule against the Crown's "tyrannical practice" in the 17th-century "of discharging juries and permitting reindictment when acquittal appeared likely." Crist v. Bretz, 437 U.S. 28, 42-43 (1978) (Powell, J., dissenting) (citations omitted).

463. Arizona v. Washington, 434 U.S. at 505.

464. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

465. *See infra* part VI.C.

466. United States v. Dinitz, 424 U.S. 600, 607 (1976), *cert. denied*, 429 U.S. 1104 (1977).

When confronted with potentially prejudicial prosecutorial or judicial error, the defendant has two options. The defendant can hope for an acquittal by the jury in spite of the error; if convicted, the defendant can seek reversal on appeal and face a retrial. Alternatively, the defendant can request a mistrial, necessarily forfeiting his right to have the case decided by the particular tribunal. The second option provides the defendant a more immediate retrial without having had to face the expense, anxiety, and delay incident to an appeal of the conviction.

If retrials following voluntary mistrials were subject to the manifest-necessity standard, courts would be less likely to grant voluntary mistrials. Consequently, the defendant's "primary control over the course to be followed in the event of such error"[467] would be undermined. In *United States v. Dinitz* the Court recognized that "traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error."[468] The net effect of *Dinitz* is that the Double Jeopardy Clause does not bar retrial following a voluntary mistrial; therefore, the State need not establish manifest necessity to justify the mistrial.[469]

The *Dinitz* consent rule applies not only when the defendant requests the mistrial, as in *Dinitz*, but also when the defendant consents to the judge's stated intention to declare a mistrial.[470] Consent is easily inferred when the defendant has requested a mistrial on grounds that are the same as, or related to, the grounds on which the mistrial is ultimately declared.[471] Some courts have inferred consent simply from the defendant's failure to object, in spite of adequate opportunity, to the court's sua sponte declaration of mistrial, even though the defendant was not explicitly advised of the judge's intention to declare a mistrial.[472] Commentators have criticized,[473] and some courts have rejected,[474] the readiness to infer consent

467. *Id.* at 609.

468. *Id.* The Court rejected the appellate court's conclusion that the defendant had "no choice but to move for or accept a mistrial." *Id.* (quoting United States v. Dinitz, 492 F.2d 53, 59 (5th Cir.), *aff'd*, 504 F.2d 854 (5th Cir. 1974) (en banc)).

469. Reasoning similar to that in *Dinitz* has been used to justify retrial following a post-jeopardy dismissal granted at the defendant's request on grounds unrelated to factual guilt or innocence. *See, e.g.*, United States v. Scott, 437 U.S. 82, 98-101 (1978), *discussed supra* notes 175-185 and accompanying text.

470. *See, e.g.*, People *ex rel.* Mosley v. Carey, 387 N.E.2d 325 (Ill.), *cert. denied*, 444 U.S. 940 (1979).

471. *See, e.g.*, United States v. Buljubasic, 808 F.2d 1260 (7th Cir.), *cert. denied*, 484 U.S. 815 (1987); *Carey*, 387 N.E.2d at 329.

472. *See, e.g.*, United States v. DiPietro, 936 F.2d 6 (1st Cir. 1991).

473. Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 536 (1977), *cited in* 3 LAFAVE & ISRAEL, *supra* note 12, at 68-69.

474. *See, e.g.*, United States v. White, 914 F.2d 747, 753-54 (6th Cir. 1990) (holding

to a mistrial from the defendant's failure to object.

In *Dinitz* the trial court expelled one of the defendant's attorneys from the case for repeated improprieties in the opening statement and gave the defendant three options: (1) a stay or recess pending appellate review of the propriety of the expulsion; (2) continuation of the trial with co-counsel; or (3) declaration of a mistrial following which the defendant could obtain other counsel for the retrial.[475] The defendant opted for a mistrial, and the Supreme Court concluded that the Double Jeopardy Clause did not bar reprosecution.[476]

No evidence indicated that the judge had expelled defense counsel in bad faith to provoke the defendant into requesting a mistrial or to prejudice the defendant's prospects for an acquittal.[477] However, the Court opined that the Double Jeopardy Clause would preclude retrial of a defendant provoked or harassed into requesting a mistrial.[478]

In *Oregon v. Kennedy*[479] the Court clarified *Dinitz*'s dictum concerning a defendant goaded into requesting a mistrial. The *Kennedy* Court explicitly recognized that the Double Jeopardy Clause precludes retrial of a defendant whose mistrial request is granted when "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."[480] The Court emphasized the narrowness of the exception to the general rule that a voluntary mistrial will not bar retrial with the following observation: "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."[481]

Because the burden of proving the improper prosecutorial motivation is on the defendant,[482] the test is very rigorous. A defendant alleging that

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that defendant's failure to object to co-defendant's motion for mistrial was insufficient to constitute consent to mistrial, especially when counsel lacked a reasonable opportunity to consider the issue).

475. United States v. Dinitz, 424 U.S. 600, 603-04 (1976), *cert. denied*, 429 U.S. 1104 (1977).

476. *Id.* at 611-12.

477. *Id.* at 611.

478. *Id.* (dictum).

479. 456 U.S. 667 (1982).

480. *Id.* at 679.

481. *Id.* at 675-76.

482. *Id.* at 683-84 (Stevens, J., concurring in the judgment). When a mistrial is granted other than pursuant to the defendant's request or with the defendant's consent, the prosecutor has the burden of establishing manifest necessity for the mistrial. Arizona v. Washington, 434 U.S. 497, 505 (1978).

the prosecutor sensed a likely acquittal and engaged in intentional misconduct to prompt the defendant to request a mistrial would have a difficult time rebutting the claim that the prosecutor's misconduct was designed to encourage the jury to convict, not to prompt the defendant to move for mistrial.[483] Speaking for four members of the Court in *Kennedy*, Justice Stevens advocated a less rigorous, more objective standard: "It is sufficient that the court is persuaded that egregious prosecutorial misconduct has rendered unmeaningful the defendant's choice to continue or to abort the proceeding."[484]

Justice Powell, a member of the *Kennedy* majority, attempted to mediate the difference between the two competing standards by observing that the prosecutorial intent could be established by reference to objective factors.[485] Nonetheless, as one commentator has observed, "[t]he circuits have been reluctant to find the intent necessary to satisfy the *Kennedy* standard."[486]

Justice Brennan, concurring in the judgment in *Kennedy*, noted that the Court's opinion did not preclude the state court from concluding on remand that state constitutional double jeopardy provisions prohibited retrial.[487] On remand the Oregon Supreme Court followed Justice Brennan's suggestion and adopted a less rigorous test for its state double jeopardy clause. The Oregon court held that retrial would be barred by the state constitution "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal."[488] The Oregon court concluded, however, that the prosecutorial misconduct in the case before it did not bar a retrial.[489]

Courts in other states, such as Arizona and Massachusetts, have adopted

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483. *Kennedy*, 456 U.S. at 688 (Stevens, J., concurring in the judgment).

484. *Id.* at 689. Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun.

485. *Id.* at 679-80 (Powell, J., concurring).

486. Clauson, *supra* note 12, at 1301 n.1457 (citing, among many other courts of appeals decisions, United States v. Wentz, 800 F.2d 1325, 1327-28 (4th Cir. 1986)). The *Wentz* court agreed with the trial court's assessment that the prosecutor lacked the intent to goad the defendant into a mistrial request. The court of appeals noted that the evidentiary hearing on the issue should precede the second trial in order to serve the basic Double Jeopardy Clause protection against inappropriate successive prosecutions. *Wentz*, 800 F.2d at 1328.

487. *Kennedy*, 456 U.S. at 680-81 (Brennan, J., concurring in the judgment).

488. State v. Kennedy, 666 P.2d 1316, 1326 (Or. 1983) (construing OR. CONST. art. I, § 12).

489. *Id.* at 1327.

tests similar to Oregon's test.[490] The Supreme Court of New Hampshire has concluded that misconduct, whether prosecutorial or judicial, precludes retrial if the misconduct is intended to provoke a motion for mistrial or to prejudice the defendant's prospects for an acquittal.[491]

C. Mistrials Without the Defendant's Consent and the Manifest-Necessity Standard

In *United States v. Perez*[492] the Court concluded that retrial following an earlier proceeding which was aborted before a verdict is not barred whenever "there is a manifest necessity for [the discharge of the jury before verdict], or the ends of public justice would otherwise be defeated."[493] The *Perez* Court did not refer to the Double Jeopardy Clause, but appears to have been applying the common-law rule concerning discharge of juries.[494] Nonetheless, the *Perez* manifest-necessity standard has become the Double Jeopardy Clause test for retrial following a mistrial to which the defendant did not consent.[495] The same standard had been used in South Carolina well before the Double Jeopardy Clause was held applicable to the states in 1969.[496]

The manifest-necessity test, described as "less than lucid" by the South Carolina Supreme Court,[497] is perhaps incapable of precise formulation. The Court has tried to clarify the test by defining the "ends of justice" as

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490. *See, e.g.*, Pool v. Superior Court, 677 P.2d 261 (Ariz. 1984) (en banc); Commonwealth v. Murchison, 465 N.E.2d 256 (Mass. 1984).

491. State v. Berry, 470 A.2d 881, 883 (N.H. 1983), *overruled by* State v. Duhamel, 512 A.2d 420 (N.H. 1986).

492. 22 U.S. (9 Wheat.) 579 (1824).

493. *Id.* at 580.

494. In his dissent in Crist v. Bretz, 437 U.S. 28 (1978), Justice Powell traced the development of rules against discharging juries to marshal support for his reading of *Perez*. *Id.* at 42-45 (Powell, J., dissenting).

495. *E.g.*, Illinois v. Somerville, 410 U.S. 458, 469 (1973).

496. *See, e.g.*, State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930). As the *Bilton* court observed:

> "The American cases hold generally that there must be a *manifest necessity* for the discharge of the jury *and leave the courts to determine in their discretion whether under all the circumstances of each case such necessity exists*. When such necessity exists, a plea of former jeopardy will not prevail on a subsequent trial. *But if the jury are discharged without defendant's consent for a reason legally insufficient and without an absolute necessity for it*, the discharge is equivalent to an acquittal, and may be pleaded as a bar to a subsequent indictment."

Id. at 342, 153 S.E. at 276 (quoting 16 C.J. *Criminal Law* § 394, at 250 (1918)).

497. State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

"the public's interest in fair trials designed to end in just judgments."[498] Later, the Court cautioned against a literal interpretation of "necessity," assuming "that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate."[499] The test can be fully understood only by considering the cases in which the test has been applied.

Perez involved retrial after discharge of a hung jury.[500] After articulating the famous test, the Court concluded, without explicit rationale, that retrial would be permissible.[501] Intuitively the decision seems correct. Justice demands resolution of criminal charges brought to trial; if a particular jury cannot agree either to acquit or convict, it is manifestly necessary that another jury must have the opportunity. Double jeopardy is not violated: first, because no prior conviction or acquittal exists; and second, because the defendant was deprived of the "valued right to have his trial completed by a particular tribunal"[502] only because of that tribunal's inability to complete the trial. Retrial following a hung jury might fail the manifest-necessity standard, however, if the mistrial was declared too quickly and without consideration of alternative resolutions to the impasse.[503]

In *United States v. Jorn*[504] the trial judge's failure to consider alternatives to mistrial was fatal to the government's retrial attempt. The government planned to prove charges of willful assistance in the preparation of false income tax returns by calling five taxpayers whose returns the defendant had allegedly helped to prepare. When the first witness was called, the judge advised him of his rights against self-incrimination, but

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498. Wade v. Hunter, 336 U.S. 684, 689-90 (1949).

499. Arizona v. Washington, 434 U.S. 497, 506 (1978).

500. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

501. *Id.* at 580.

502. *Wade*, 336 U.S. at 689.

503. *See, e.g.*, State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983). In *Prince*, after deliberating for five hours, the jury made a late evening request to have the testimony of two witnesses read. After being told by the court reporter that reading the testimony would take slightly more than two hours, the judge declared a mistrial over the defendant's objection. The South Carolina Supreme Court concluded that there was no manifest necessity for discharging the jury; therefore, retrial was barred. *Id.* at 33, 301 S.E.2d at 472-73. Because the jury had not indicated that it was hopelessly stuck, the judge should have either granted the jury's request or recessed until the following morning to begin reading the testimony.

A judge faces a dilemma when confronted with a jury having difficulty agreeing on a verdict. As in *Prince*, dismissing the jury too soon may run afoul of the manifest-necessity standard; yet, instructing the jury to try again may spawn a challenge that the jury was coerced into convicting. *But cf.* State v. Tillman, 304 S.C. 512, 405 S.E.2d 607 (Ct. App. 1991) (holding that supplemental instructions were not coercive).

504. 400 U.S. 470 (1971).

expressed incredulity at the witness's assertion that the Internal Revenue Service had so advised him. Consequently, the judge refused to let the witness testify before consulting with an attorney. Upon learning that the other witnesses were similarly situated, the judge discharged the jury so that the witnesses could consult with counsel. Before the scheduled retrial, the judge dismissed the information on the ground of former jeopardy.[505]

The Supreme Court affirmed the trial judge on direct appeal. A plurality concluded that there was no manifest necessity for the mistrial, noting that the trial judge gave no consideration to the possibility of a continuance during which the witnesses might have consulted with counsel. Consequently, the abrupt discharge of the jury was not an exercise of sound discretion.[506] Justice Harlan, writing for the four-member plurality, suggested that the manifest-necessity test represents a balancing of the defendant's right to have the trial completed by a particular tribunal against a host of practical difficulties the government encounters in presenting its case.[507] The three dissenters in *Jorn* found no "'abuse' of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishment of crime."[508]

Consideration of alternatives to a mistrial is important in determining whether manifest necessity for the mistrial exists. For example, in *State v. Kirby*[509] the South Carolina Supreme Court concluded that the trial judge properly granted a mistrial after the solicitor died in mid-trial. Manifest necessity existed because the assistant solicitor had not been present during the trial and was not in a proper emotional state to take over the case.[510] Accordingly, retrial of the defendant was not double jeopardy.[511]

The *Jorn* dissenters relied on *Gori v. United States*,[512] a five-to-four decision which concluded that retrial was not barred following a sua sponte mistrial prompted by the government's questioning a witness in a manner designed to bring out uncharged misconduct by the defendant. The Court in *Gori* concluded that retrial following a mistrial granted to protect or benefit the defendant was not the prohibited, oppressive use of successive prosecutions.[513]

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505. *Id.* at 472-73.

506. *Id.* at 487.

507. *Id.* at 479-80; *cf.* Wade v. Hunter, 336 U.S. 684, 691-92 (1949) (concluding that the tactical problems of an army in the field justified discharge of one court-martial and the subsequent commencement of another).

508. *Jorn*, 400 U.S. at 492 (Stewart, J., dissenting).

509. 269 S.C. 25, 236 S.E.2d 33 (1977).

510. *Id.* at 29-31, 236 S.E.2d at 35.

511. *Id.*

512. 367 U.S. 364 (1961).

513. *Id.* at 369.

The continued vitality of *Gori* is questionable. The plurality in *Jorn* eschewed "bright-line rules based on either the source of the problem or the intended beneficiary of the ruling."[514] Moreover, in *United States v. Dinitz*[515] the Court observed, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error."[516] If a mistrial is granted at the defendant's request, retrial ordinarily will not be barred.[517] A mistrial granted without the defendant's consent, even if motivated by a desire to protect the defendant from error, deprives him of control over the course of the litigation. Therefore, such a mistrial is subject to the manifest-necessity standard, including consideration of alternatives such as cautionary instructions to the jury.

In addition, *Downum v. United States*[518] and *Illinois v. Somerville*,[519] also five-to-four decisions, combine to defeat any notion of a bright-line rule concerning mistrials caused by prosecutorial failings. In *Downum*, after the jury was sworn, the prosecutor discovered that the key witness in two of the four counts against the defendant was not present, could not be located, and had not been subpoenaed. The defendant moved for dismissal of two counts for want of prosecution and requested that the trial continue on the remaining counts. The judge denied the motion and discharged the jury over the defendant's objection. At a retrial two days later, the defendant's plea of former jeopardy was rejected, and he was convicted on all counts.[520]

The Supreme Court concluded that the defendant should not have been subjected to the second trial. The Court noted that the facts did not suggest harassment of the accused through successive prosecutions or deliberate manipulation of a mistrial request to afford a more favorable opportunity to convict; nonetheless, the Court found the retrial barred. The prosecutor's failure to ensure the presence of his witnesses did not amount to manifest necessity justifying the mistrial.[521] Although the Court indicated that in some situations, presumably those involving unanticipated illness or disappearances, the absence of a witness might justify mistrial,[522] *Downum* was not of that type. The Court concluded that retrial on all the counts was

514. *Jorn*, 400 U.S. at 486.
515. 424 U.S. 600 (1976).
516. *Id.* at 609.
517. *See supra* text accompanying notes 466-478 (discussing *Dinitz*, 424 U.S. 600).
518. 372 U.S. 734 (1963).
519. 410 U.S. 458 (1973).
520. *Downum*, 372 U.S. at 735.
521. *Id.* at 736-38.
522. *Id.* at 737.

prohibited, without distinguishing the two counts to which the absent witnesses were crucial from the other four that the government was reasonably prepared to prove.[523]

The prosecutor in *Illinois v. Somerville*[524] was also derelict, but the Court concluded that retrial following mistrial over the defendant's objection was not prohibited. After the jury was sworn, the prosecutor realized that the indictment was fatally defective for failing to include the mental element of the crime.[525] The trial judge concluded that further proceedings under the indictment would be useless and, therefore, granted the State's motion for a mistrial over the defendant's objections. The defendant was reindicted, tried, and convicted.[526]

The Court began its analysis by quoting a frequently excerpted passage from Justice Story's opinion in *Perez*:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."[527]

The Court collapsed Justice Story's "manifest necessity" *or* "the ends of justice" two-pronged standard into a single standard and found "manifest necessity" for the mistrial because otherwise the "ends of public justice" would be defeated.[528]

The ends of justice include both the public's interest in seeing criminal charges resolved and the judiciary's interest in efficiency. The Court

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523. *Id.*

524. 410 U.S. 458 (1973).

525. *Id.* at 459. The indictment, which charged theft, failed to alleged that the accused intended to permanently deprive the owner of his property. *Id.*

526. *Id.* at 459-60.

527. *Id.* at 461 (quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824)).

528. *Id.* at 459.

reasoned that, if involuntary mistrial were not available for fatally defective indictments, a final resolution would necessarily entail conviction at the first trial, reversal on appeal, reindictment, retrial, and conviction or acquittal. The mistrial enabled a swifter resolution of the charge without the formalistic step of reversal on appeal because of the defective indictment. The *Somerville* opinion emphasized both the broad discretion reserved to the trial judge and the lack of a mechanistic formula for determining manifest necessity.[529]

In distinguishing *Downum*, the *Somerville* Court observed that in *Downum* the prosecution knew prior to jury selection that the key witnesses were missing and had not been subpoenaed.[530] However, the Court did not explain how the prosecutor's pre-jury selection knowledge in *Downum* was any different from that in *Somerville*, in which the prosecutor certainly should have known prior to jury selection that the indictment was defective.

Nonetheless, the cases can be distinguished. In *Downum* the prosecutor began the trial with insufficient evidence to convict. As the Court later observed in *Arizona v. Washington*,[531] "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."[532]

In *Somerville*, on the other hand, as in earlier cases that approved retrial following a involuntary mistrial, there was "a procedural defect [that] might or would preclude the public from either obtaining an impartial verdict or keeping a verdict of conviction if its evidence persuaded the jury."[533]

The trial judge's failure to make an explicit finding of manifest necessity before granting a mistrial is not necessarily fatal to a retrial. In *Arizona v. Washington*[534] the Court concluded that as long as the record reflects the judge's reasoning behind granting a mistrial, the judge does not

529. *See id.* at 462-64.

530. *Id.* at 464-65.

531. 434 U.S. 497 (1978).

532. *Id.* at 508 (citations omitted).

533. *Somerville*, 410 U.S. at 468-69 (citing Lovato v. New Mexico, 242 U.S. 199 (1916) (allowing retrial following discharge of the jury because the defendant had not pleaded to the indictment); Thompson v. United States, 155 U.S. 271 (1894) (allowing retrial following mistrial granted when the judge discovered one of the jurors was disqualified for having served on the grand jury that had indicted the defendant); Simmons v. United States, 142 U.S. 148 (1891) (allowing retrial following mistrial granted because of possible bias due to a newspaper article indicating that one of the jurors was a friend of the defendant)).

534. 434 U.S. 497 (1978).

need to utter the precise phrase, "manifest necessity."[535]

Significantly, *Arizona v. Washington* introduced a three-tiered sliding scale of appellate scrutiny, depending upon the grounds on which the trial court declared the mistrial. As was noted above, strictest scrutiny is appropriate for cases of prosecutorial manipulation of the trial or other harassment of the accused.[536] At the other end of the spectrum are cases that conclude with a hung jury.[537] In *Arizona v. Washington* the Court concluded that the mistrial, which was granted because of potential juror bias occasioned by prejudicial remarks in defense counsel's opening statement, fell into a middle area in which the trial judge's exercise of discretion "is entitled to special respect."[538] The trial judge who hears the improper argument and sees the jurors' reaction is in the best position to determine whether cautionary instructions would suffice to cure potential bias.

VII. SENTENCING

A. Multiple Charges, Successive Trials, and Governmental Appeals of Sentences

The most common double jeopardy sentencing issue concerns the prohibition against multiple punishments for a single criminal act. The cases are complicated because the Double Jeopardy Clause generally prohibits multiple punishments for a single criminal act, but permits multiple punishments for a single crime in a single prosecution when the legislature has so provided.[539]

As previously discussed in Parts III and IV, the Double Jeopardy Clause prohibits subsequent prosecutions for the same offense following acquittal or conviction, except for reprosecution following reversal of a

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535. *Id.* at 516-17.

536. *See supra* note 462 and accompanying text.

537. Arizona v. Washington, 434 U.S. at 509.

538. *Id.* at 510. The South Carolina Supreme Court upheld a defendant's retrial following a mistrial granted after the trial judge dismissed two jurors upon discovering that one juror was related to the defendant and another juror was related to the State's chief witness. State v. Gamble, 275 S.C. 492, 272 S.E.2d 796 (1980).

539. *E.g.*, Missouri v. Hunter, 459 U.S. 359 (1983) (upholding multiple punishments for a single act of armed robbery by allowing punishment for first degree robbery, which requires use of a deadly weapon, and also for armed criminal action); State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990) (upholding multiple punishments for armed robbery and possession of a weapon during a violent crime); State v. Walsh, 300 S.C. 427, 388 S.E.2d 777 (1988) (holding that multiple punishments are not authorized for pointing a firearm and assault with intent to kill). This issue is developed in detail *supra* part V(A), "Multiple Charges in a Single Prosecution."

conviction on appeal.[540] If the defendant is reconvicted on retrial following reversal of the original conviction, the Double Jeopardy Clause does not prohibit a more severe sentence than the sentence originally imposed.[541] However, the Double Jeopardy Clause requires that the defendant receive credit for punishment served pursuant to the original sentence.[542]

In *United States v. DiFrancesco*,[543] one of the most important double jeopardy sentencing cases,[544] the Court concluded that the Double Jeopardy Clause does not prohibit the government from appealing a sentence, or the appellate court from increasing the sentence, if the legislature has so provided.[545] Sentences are not like charges; an imposed sentence is not an implied acquittal of a greater sentence. The double jeopardy rules of implied acquittal do not apply to greater and lesser sentences.[546] The government's appeal in *DiFrancesco* did not involve a successive prosecution threat because the appellate court based its reassessment of the sentence on the trial record.[547] *DiFrancesco* is particularly significant in light of a number of jurisdictions that have adopted sentencing guideline schemes which provide for appellate review of sentencing at the instance of either the defendant or the government.[548]

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540. United States v. Ball, 163 U.S. 662 (1896). *Ball* is discussed *supra* text accompanying note 241. The prohibition on successive prosecutions is discussed *supra* part V(B), "Successive Prosecutions."

541. North Carolina v. Pearce, 395 U.S. 711, 719-21 (1969). Nevertheless, the Due Process Clause would prohibit a greater sentence on reconviction motivated by vindictiveness based on the defendant's having appealed the earlier conviction. The resentencing judge must justify the more severe sentence by reference to identifiable conduct by the defendant occurring after the original sentencing procedure. *Id.* at 725-26.

The presumption of vindictiveness is not applicable if the initial conviction was based on a guilty plea and the reconviction followed a trial. Alabama v. Smith, 490 U.S. 794 (1989) (overruling Simpson v. Rice, 395 U.S. 711 (1969) (a companion case to *Pearce*)). Due process and sentencing on reconviction is discussed in 3 LAFAVE & ISRAEL, *supra* note 12, at 919-21.

542. *Pearce*, 395 U.S. at 718-19. The Court emphasized that "punishment already endured [must be] fully subtracted from any new sentence imposed." *Id.* at 718.

543. 449 U.S. 117 (1980).

544. The *DiFrancesco* opinion contains an extended review of the history, rationale, and purpose of the Double Jeopardy Clause. *See id.* at 126-31.

545. For example, in the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3575-3576 (1985), Congress provided that the appellate courts may impose a more severe sentence for "dangerous special offenders."

546. *DiFrancesco*, 449 U.S. at 132-33.

547. *Id.* at 136.

548. *E.g.*, 18 U.S.C. § 3742 (a)-(b) (1988 & Supp. III 1991); MINN. STAT. ANN. § 244.11 (West 1992).

In spite of *DiFrancesco*, the Court in *Bullington v. Missouri*[549] concluded that the government cannot seek the death penalty after reconviction of a capital offense following remand of an earlier capital conviction in which the original jury declined to assess capital punishment. The jury made its sentencing determination in a separate trial-type proceeding in which the State had the burden to establish aggravating circumstances beyond a reasonable doubt. Consequently, the sentence of life imprisonment was equivalent to an implied acquittal for the alternative sentence of death.[550]

The Supreme Court has yet to decide whether the *Bullington* rule applies to trial-like sentence enhancement proceedings in non-capital cases. In *Lockhart v. Nelson*[551] the Court expressly declined to consider the issue. Lower courts are split: some holding that the Double Jeopardy Clause precludes the State from seeking a second sentence enhancement after failing to establish the required statutory predicate in the first sentencing proceeding;[552] others holding that the Double Jeopardy Clause does not preclude the State from seeking such enhancements.[553]

When unauthorized multiple punishments have been imposed, what remedy does the Double Jeopardy Clause require? In *Ex parte Lange*[554] the defendant was sentenced to a fine *and* imprisonment for an offense punishable by fine *or* imprisonment. The Court held that the defendant was entitled to release from imprisonment because he had already paid the fine.[555]

In re Bradley[556] involved another defendant sentenced to both fine and imprisonment under a statute authorizing only fine or imprisonment. While in prison, the defendant paid the fine. The trial court struck the fine from the sentence, retained the prison term, and directed the clerk of court to return the fine. The defendant refused to accept the returned money. The Court held that the defendant was entitled to be released, stating that "[s]ince one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint."[557]

The Court recently revisited this type of question in *Jones v.*

549. 451 U.S. 430 (1981).

550. *Id.* at 445-46; *see infra* notes 569-573 and accompanying text.

551. 488 U.S. 33, 37-38 n.6 (1988).

552. *E.g.*, Durosko v. Lewis, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, 495 U.S. 907 (1990).

553. People v. Hunt, 557 N.Y.S.2d 694 (App. Div. 1990), *aff'd*, 579 N.E.2d 208 (N.Y.), *cert. denied*, 112 S. Ct. 432 (1991).

554. 85 U.S. (18 Wall.) 163 (1873).

555. *Id.* at 178.

556. 318 U.S. 50 (1943).

557. *Id.* at 52, *quoted in* Jones v. Thomas, 491 U.S. 376, 383 (1989).

Thomas.[558] A trial court gave the defendant consecutive sentences of life imprisonment for felony murder and fifteen years for the underlying felony of attempted robbery. The trial court ordered the robbery sentence to be served first. In an unrelated case, the state supreme court later concluded that the legislature had not authorized separate sentences for felony murder and the underlying felony.[559] In response, the governor commuted the defendant's sentence for attempted robbery to time served. The trial court vacated the conviction and sentence for attempted robbery and resentenced him on felony murder, crediting the time served for attempted robbery against the life sentence for felony murder.[560] The defendant claimed that because he had completed, by virtue of the commutation, one of the two sentences authorized by the legislature, the Double Jeopardy Clause required his release from serving any part of the other sentence.[561]

The Court disagreed, observing that the primary concern of the Double Jeopardy Clause is that one not be sentenced to a greater punishment than the legislature authorized. The Court concluded that the defendant was serving no more than a life sentence, which the legislature had authorized.[562]

The double jeopardy problem in *Jones* stemmed from the fact that the governor had allowed the defendant to serve out one of the sentences that the legislature had authorized for his offense. Meanwhile, the trial court applied the time served on the sentence for attempted robbery to the sentence for felony murder (just as the court in *In re Bradley* had attempted to give Bradley back his fine).

The *Jones* Court distinguished *Lange* and *Bradley*. The Court drew no more from *Lange* than "the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature."[563] But strict application of the *Bradley* rule would have required Jones's release, given that he had already satisfied one of the authorized sentences for his crime. However, the Court distinguished *Bradley* as a case of "true" alternative punishments—fine or imprisonment—that the legislature had authorized for a single offense. Surely the legislature never would have intended that the punishment for an underlying felony be imposed as an alternative sentence for felony murder.[564]

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558. 491 U.S. 376 (1989).

559. *Id.* at 378-79 (citing State v. Morgan, 612 S.W.2d 1 (Mo. 1981); State v. Olds, 603 S.W.2d 501 (Mo. 1980)).

560. *Id.* at 378-79.

561. *Id.* at 382.

562. *Id.* at 381-82.

563. *Id.* at 383 (citing United States v. DiFrancesco, 449 U.S. 117, 139 (1980)).

564. *See id.* at 384-85.

Finally, the *Jones* Court concluded that the trial judge's resentencing of the defendant to a new life term on the felony murder charge was not the imposition of an additional sentence, but merely a valid remedy for improper "'cumulative sentencing imposed in a single trial.'"[565] Jones's argument makes more sense in a context of cumulative sentences of fixed terms of years. However, the Court did not disagree with Justice Scalia's assertion for the four dissenters that the Double Jeopardy Clause prohibits a judge who has sentenced an individual to less than the maximum term from giving that defendant additional punishment.[566]

B. Capital Sentencing Procedures

1. Federal Cases

As the Court observed in *United States v. DiFrancesco*,[567] the "conviction of lesser implies acquittal of greater" doctrine has no place in sentencing. Thus, if a subsequent sentencing proceeding is authorized, the Double Jeopardy Clause does not prohibit imposition of a greater sentence.[568] However, in *Bullington v. Missouri*[569] the Court concluded that capital sentencing procedures are different. A defendant convicted of a capital offense and sentenced to life imprisonment cannot face the death penalty on reconviction following reversal of his original conviction.[570]

The typical sentencing procedure is not like a trial; the prosecution need not establish particular elements by any standard of proof, and the sentencing authority has substantial discretion to select a sentence within legislatively determined boundaries.[571] By contrast, the capital sentencing scheme in *Bullington* was nearly as structured as a trial of the offense. After finding the defendant guilty of the capital offense, the jury must consider evidence of various factors in aggravation and mitigation of the conduct. The jury may sentence the defendant to death only by designating in writing the factors in aggravation that it found beyond a reasonable doubt. Also, the

565. *Id.* at 386 (quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983)).

566. *Id.* at 392 (Scalia, J., dissenting).

567. 449 U.S. 117 (1980).

568. *Id.* at 132-33.

569. 451 U.S. 430 (1981).

570. *Id.* at 446 (refusing to extend the reasoning of Stroud v. United States, 251 U.S. 15 (1919)).

571. *Id.* at 439-40. Sentencing in *DiFrancesco* was something of an exception to the traditionally informal sentencing procedures. The Government had to establish, by a preponderance of the evidence in a separate sentencing proceeding, that the defendant was a "dangerous special offender." Then, the judge had to select an appropriate term of up to 25 years. *Id.* at 440-41 (citing the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3575-3576 (1985)).

jury must unanimously conclude beyond a reasonable doubt that the factors in aggravation warrant the death penalty. If the jury is unable to agree on capital punishment, the defendant automatically receives a life sentence.[572]

The Court in *Bullington* concluded that the sentencing process was analogous to the determination of guilt or innocence. As in a trial, the jury had only two options, the hearing was formally structured, and the burden was placed on the State to establish certain factors beyond a reasonable doubt. The Court held that rejection of the death sentence is the functional equivalent of an implied acquittal in a trial. Consequently, the Double Jeopardy Clause prohibited the State from subsequently exposing the defendant to the death penalty for the same offense when a life sentence had previously been given.[573]

The five-to-four decision in *Bullington* was reaffirmed by a seven-justice majority in *Arizona v. Rumsey*.[574] In Arizona, after a jury finds a defendant guilty of a capital offense, the statutory capital punishment scheme provides that the trial judge conducts the sentencing proceeding. The judge must impose capital punishment if at least one aggravating circumstance is found and if no substantial mitigating circumstances justify leniency.[575] The State's burden of proof is "certainty beyond a reasonable doubt."[576]

In *Rumsey* the trial judge found no factors in aggravation, specifically noting that the "killing for pecuniary gain" factor was inapplicable because that factor was limited to contract killings. Accordingly, the judge sentenced the defendant to life imprisonment. The appellate court concluded that the trial judge had misinterpreted the statutory provision regarding the aggravating circumstance and that killings for pecuniary gain included killings in the course of a robbery or burglary. The appellate court reversed the sentence and remanded for a new capital sentencing proceeding. In the subsequent sentencing proceeding the trial court found the aggravating circumstance of a "killing for pecuniary gain" and sentenced the defendant to death.[577]

The Supreme Court concluded that under *Bullington* the implied rejection of the death penalty barred its reimposition, even though the initial sentence of life imprisonment was made possible by the trial court's erroneous ruling of state law.[578] As the Court stated: "'[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous

572. *Id.* at 432-35.
573. *Id.* at 444-46.
574. 467 U.S. 203 (1984).
575. *Id.* at 205.
576. *Id.* at 209.
577. *Id.* at 205-08.
578. *Id.* at 211-12 (explicitly declining the State's invitation to overrule *Bullington*).

interpretations of governing legal principles'. . . affects the accuracy of that determination, but it does not alter its essential character.'"[579]

When the initial sentencing proceeding results in a death sentence, however, the death penalty may be imposed upon a retrial, even if the first trial court committed substantial error in assessing the initial death sentence. In *Hitchcock v. Dugger*[580] the sentencing court improperly refused to consider mitigating evidence that was not listed in the capital murder statute. The Supreme Court unanimously reversed the sentences. The Court noted, however, that on remand the death penalty could be imposed.[581]

Even if the trial court initially imposed the death sentence on the basis of an aggravating circumstance, which the appellate court found not to exist, the Double Jeopardy Clause does not foreclose subsequent imposition of capital punishment.[582] In *Poland v. Arizona*[583] the trial court concluded, as in *Rumsey*, that the aggravating factor of "a killing for pecuniary gain" was applicable only to contract killings. But the *Poland* Court found another factor in aggravation—the killing was in an especially heinous, cruel, or depraved manner—and sentenced the defendant to death. The appellate court found the evidence insufficient to support the cruelty factor, but ruled that the "killing for pecuniary gain" could be considered upon resentencing. On remand, the defendant was reconvicted of the capital offense, and the death sentence was again imposed, this time on the basis of both aggravating factors. The appellate court again found insufficient evidence to support the cruelty factor, but sustained the death sentence on the basis that the killing was for pecuniary gain.[584]

The Supreme Court affirmed, distinguishing this case from *Bullington* and *Rumsey* on the ground that the initial life sentence in the former cases amounted to an implied rejection of the death sentence. In *Poland*, however, the trial court initially rendered a death sentence, but neither the trial court nor the appellate court ever concluded during either the first or second hearing that the State had failed to prove that the death penalty was appropriate.[585]

2. *South Carolina Cases*

The South Carolina Supreme Court has considered several double

579. *Id.* at 211 (quoting United States v. Scott, 437 U.S. 82, 98 (1978)).
580. 481 U.S. 393 (1987).
581. *Id.* at 398-99.
582. *See* Poland v. Arizona, 476 U.S. 147 (1986).
583. 476 U.S. 147 (1986).
584. *Id.* at 149-51.
585. *Id.* at 155-57.

jeopardy issues related to capital punishment. Unfortunately, however, the court sometimes treats the issues in a conclusory fashion. For example, in *State v. Spann*[586] the court concluded that the Double Jeopardy Clause did not prohibit imposing a sentence for burglary and using the burglary as a factor in aggravation to support a death penalty for murder.[587] The court did not explicitly consider whether the legislature had intended that result.[588] Also unclear in *Spann* is whether the murder conviction was based on a felony murder theory with the burglary as the underlying felony, or on a traditional malice theory independent of the burglary.[589]

Relying on *Bullington*, the court in *State v. Gilbert*[590] concluded that no double jeopardy violation occurred by submitting evidence of a factor in aggravation to a second sentencing jury, because the first jury made no finding on that particular factor.[591] The first sentencing jury found one of the submitted factors in aggravation and rendered a death sentence. The second sentencing jury found both factors in aggravation and also rendered a death sentence. The *Gilbert* majority found that the first jury's failure to make a finding on both of the factors in aggravation was not an implied acquittal of the unfound factor.[592] However, Justice Harwell, in dissent, concluded that the jury's failure to make a finding established reasonable doubt about the factor's existence.[593]

Subsequent cases have upheld, without dissent, the practice of submitting to a second sentencing jury factors to which the earlier sentencing jury had been exposed, but of which that jury made no finding.[594]

The South Carolina Supreme Court has also concluded that a trial court's failure to submit a factor in aggravation to a jury when submission is not requested by the State does not amount to a ruling that the evidence could not support the presence of the factor. Therefore, submitting the factor

586. 279 S.C. 399, 308 S.E.2d 518 (1983), *cert. denied*, 466 U.S. 947 (1984).

587. *Id.* at 403, 308 S.E.2d at 520.

588. *See* Missouri v. Hunter, 459 U.S. 359 (1983), *discussed supra* notes 286-289 and accompanying text.

589. A state appellate court's conclusion that the legislature had not intended separate penalties for felony murder and the underlying felony led to the double jeopardy difficulties in Jones v. Thomas, 491 U.S. 376 (1989), *discussed supra* notes 558-566 and accompanying text.

590. 277 S.C. 53, 283 S.E.2d 179 (1981), *cert. denied*, 456 U.S. 984 (1982).

591. *Id.* at 58-59, 283 S.E.2d at 181-82.

592. *Id.* at 60, 283 S.E.2d at 182.

593. *Id.* at 60-63, 283 S.E.2d at 182-84 (Harwell, J., dissenting).

594. *E.g.*, State v. Johnson, 306 S.C. 119, 134, 410 S.E.2d 547, 556 (1991), *cert. denied*, 112 S. Ct. 1691 (1992); State v. Elmore, 286 S.C. 70, 74, 332 S.E.2d 762, 764 (1985), *vacated on other grounds*, 476 U.S. 1101 (1986).

in aggravation to a jury at a subsequent capital punishment proceeding is not foreclosed.[595]

VIII. PROCEDURAL ISSUES AND GUILTY PLEAS

A. Procedural Issues

1. Waiver

The protection against double jeopardy can be waived, as can other constitutional rights.[596] However, surprisingly little definitive authority exists about the circumstances under which one is held to have waived a double jeopardy claim. Courts distinguish between claims concerning successive prosecutions and those concerning multiple counts in a single trial, but the United States courts of appeals are split about when waiver will be found.[597]

Further complicating the issue, the Supreme Court has offered limited guidance. The Court has concluded that opposing the government's motion to consolidate charges into a single trial amounts to an implied waiver of the protection against successive prosecutions.[598] In addition, a double

595. *See* State v. Plath, 281 S.C. 1, 18, 313 S.E.2d 619, 629, *cert. denied*, 467 U.S. 1265 (1984). Section 16-3-20(c) of the South Carolina Code requires the trial judge to submit to the jury any statutory aggravating circumstances "which may be supported by the evidence." S.C. CODE ANN. § 16-3-20(c) (Law. Co-op. 1985 & Supp. 1991). The *Plath* court concluded, however, that this code provision does not authorize the court to submit factors in aggravation not submitted by the State. *Plath*, 281 S.C. at 18, 313 S.E.2d at 629.

596. The classic definition of waiver for constitutional rights "is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

597. For example the Fifth Circuit has concluded that failure to object during trial waives a double jeopardy claim against successive prosecutions, Grogan v. United States, 394 F.2d 287, 289 (5th Cir. 1967), but not a claim against multiple charges in a single trial, United States v. Devine, 934 F.2d 1325, 1343 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 349 (1991). Furthermore, the Sixth Circuit has concluded that a claim against multiple charges is waived if not made prior to trial, but that a claim against being sentenced on those charges is not waived. United States v. Rosenbarger, 536 F.2d 715, 721-22 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

Some courts have held that a claim against successive prosecutions will be deemed waived if not asserted prior to trial, United States v. Milhin, 702 F.2d 522, 524 (5th Cir. 1983), or at trial, United States v. Bascaro, 742 F.2d 1335, 1365 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). On the other hand, the First Circuit has held that a claim against successive prosecutions is not waived even if not made at trial. United States v. Rivera, 872 F.2d 507, 509 (1st Cir. 1989), *cert. denied*, 493 U.S. 818 (1989).

Most of these cases, as well as others, are cited in Clauson, *supra* note 12, at 1330 nn.1562-63.

598. Jeffers v. United States, 432 U.S. 137, 153-54 (1977).

jeopardy claim may be waived through a plea bargain, even if the plea bargain did not explicitly refer to double jeopardy.[599]

Since *United States v. Ball*[600] the Court has recognized the well-established rule that the Double Jeopardy Clause does not ordinarily preclude retrial of a defendant who has successfully appealed a conviction.[601] The *Ball* rule is sometimes explained by a continuing-jeopardy theory and sometimes by a waiver theory.[602] However, because a defendant convicted of a lesser included offense of the offense charged is impliedly acquitted of the greater offense, his appeal of the conviction for the lesser included offense does not waive his double jeopardy protection against reprosecution for the greater offense.[603]

In *Burks v. United States*[604] the defendant's motion for a judgment of acquittal was denied. He was convicted, and his motion for a new trial because of insufficient evidence was denied. The appellate court reversed the conviction for insufficient evidence and remanded with instructions either to grant a new trial or to enter a directed verdict of acquittal.[605] The Supreme Court modified the order, concluding that the appellate court's reversal for insufficient evidence amounted to an acquittal and, thus, precluded reprosecution. The Court also determined that the defendant had not waived his double jeopardy protection by a motion for a new trial.[606]

A defendant who moves for a mistrial after jeopardy has attached is ordinarily subject to reprosecution without the government's having to establish a manifest necessity for the granting of the mistrial.[607] A defendant typically moves for a mistrial because of prosecutorial or judicial error that is perceived hopelessly to prejudice the defendant's prospects for acquittal. If the traditional standard of waiver—knowing, intelligent, and voluntary[608]—were applied to the defendant's decision, the motion for

599. Ricketts v. Adamson, 483 U.S. 1, 9-10 (1987); *see infra* notes 679-684 and accompanying text.

600. 163 U.S. 662 (1898).

601. *Id.* at 671-72. Reprosecution is precluded, however, if the appellate court reversed the conviction because of insufficient evidence. Burks v. United States, 437 U.S. 1 (1978), *discussed supra* notes 156-159 and accompanying text.

602. *See* Green v. United States, 355 U.S. 184, 189 (1957).

603. *Id.* at 191-98.

604. 437 U.S. 1 (1978).

605. *Id.* at 3-4.

606. *Id.* at 17.

607. United States v. Dinitz, 424 U.S. 600 (1976), *discussed supra* notes 466-478 and accompanying text. The exception to this rule involves situations in which the defendant was goaded by the prosecution into moving for the mistrial. Oregon v. Kennedy, 456 U.S. 667 (1982), *discussed supra* notes 479-489 and accompanying text.

608. Johnson v. Zerbst, 304 U.S. 458 (1938), *cited in Dinitz*, 424 U.S. at 609 n.11.

mistrial might be seen as involuntary and, therefore, not as a waiver of the Double Jeopardy Clause's protection against reprosecution. A defendant confronted with such error faces a "Hobson's choice" between continuing a trial tainted by the error or giving up his right to resolution by the first jury. Acknowledging this dilemma, the *Dinitz* Court concluded that traditional concepts of waiver have little relevance in light of the importance of the defendant's right to retain primary control over the course of the litigation in the event of such error.[609]

The defendant's motion for voluntary mistrial, which does not preclude reprosecution, has been characterized as "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."[610] A defendant's post-jeopardy motion to dismiss based on reasons unrelated to guilt or innocence has been similarly characterized and does not preclude the government's appeal of the dismissal with the aim of reprosecution.[611] Defense motions for mistrial and dismissal are made to take the decision on guilt or innocence away from the trier of fact. When either motion is granted, the defendant has not been "deprived" of his right to go to the first jury; therefore, and the Double Jeopardy Clause does not bar reprosecution.[612]

2. Burden of Proof

When a defendant makes a colorable claim of double jeopardy, the government has the burden of establishing that the prosecution is not for the same offense of which the defendant was previously placed in jeopardy. Although the Supreme Court has never explicitly so held, it has observed that

> [a]ll nine federal Circuits which have addressed the issue have held that "when a defendant puts double jeopardy in issue with a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses."[613]

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609. *Dinitz*, 424 U.S. at 609.

610. United States v. Scott, 437 U.S. 82, 93 (1978).

611. *Id.* at 101. The dismissal in *Scott* was based on prejudicial pre-indictment delay. *Id.* at 84.

612. *Id.* at 100.

613. Grady v. Corbin, 495 U.S. 508, 522 n.14 (1990) (quoting United States v. Ragins, 840 F.2d 1184, 1192 (4th Cir. 1988)), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993); *accord*, State v. Amerson, 428 S.E.2d 871 (S.C. 1993); State v. Dowey, 307 S.C. 69, 413 S.E.2d 848 (Ct. App. 1992).

The government's burden is by a preponderance of the evidence.[614]

The Court has spoken more directly concerning the burden of proof after the trial judge has declared an involuntary mistrial: "[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant."[615]

The manifest-necessity standard is inapplicable if the defendant requested or consented to the granting of the mistrial.[616] However, in those situations in which the defendant was goaded into requesting a mistrial by deliberate prosecutorial misconduct, if the defendant first establishes prosecutorial overreaching, the prosecution must then establish manifest necessity.[617]

3. Appeals
a. Interlocutory Appeals

A defendant who is convicted after a trial court rejects his pretrial claim of double jeopardy is denied an important part of the protection of the Double Jeopardy Clause, even if the initial double jeopardy claim prompts the appellate court to reverse and remand with directions to dismiss.

> [T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.[618]

The Double Jeopardy Clause protects against exposure to double jeopardy, to being forced to "run the gauntlet" a second time. Even if the defendant is acquitted, or is convicted but has his double jeopardy claim vindicated on

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614. *Ragins*, 840 F.2d at 1192.

615. Arizona v. Washington, 434 U.S. 497, 505 (1978).

616. United States v. Dinitz, 424 U.S. 600 (1976); *see supra* notes 466-478 and accompanying text.

617. Oregon v. Kennedy, 456 U.S. 667, 683-84 (1982) (Stevens, J., concurring), *discussed supra* notes 479-489 and accompanying text.

618. Abney v. United States, 431 U.S. 651, 660-61 (1977).

appeal, he has been forced to endure the embarrassment, expense, and anxiety of an inappropriate second trial—precisely what the Double Jeopardy Clause guards against.

Consequently, in *Abney v. United States*[619] the Court concluded that rejection of a claim of double jeopardy falls within an exception to the final judgment rule so that an interlocutory appeal can be taken. Only by immediate appeal may the second trial be avoided and the double jeopardy right be fully vindicated. In spite of the dictum quoted above concerning the Double Jeopardy Clause, *Abney* is a statutory decision construing federal law; therefore, the decision is not binding on the states as part of the law of double jeopardy.[620]

The South Carolina Supreme Court has disagreed with the rationale of *Abney*; thus, in South Carolina, "an order denying a double jeopardy claim is not immediately appealable."[621] In *State v. Miller*[622] the court emphasized that the right to appeal in South Carolina is conferred by statute and that, under the applicable statutory provision, a criminal defendant cannot appeal until he has been sentenced.[623] Although not articulated in *Miller*, the apparent rationale for the rule against interlocutory appeals is to promote judicial efficiency and to avoid unnecessary delay of the prosecution.[624]

Whether denying an interlocutory appeal of the rejection of a double jeopardy claim promotes judicial efficiency is dubious. A state court's denial of the claim is cognizable in a federal habeas corpus action prior to trial in the state court.[625] Whether denying interlocutory appeals is necessary in order to avoid frivolous, dilatory tactics by the defendant is also questionable. In the federal system, after denial of the defendant's motion to dismiss for double jeopardy, a trial may proceed pending appeal of the trial court's finding that the claim is frivolous.[626] A number of states have

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619. 431 U.S. 651 (1977).

620. The *Abney* Court, construing the "final decision" provision of the jurisdictional statute for the federal courts of appeals, 28 U.S.C. § 1291 (1988), concluded that pretrial rejection of a double jeopardy claim falls within the collateral order exception to the final-judgment rule announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). *Abney*, 431 U.S. at 656-62. The collateral-order exception of *Abney* was reaffirmed in Richardson v. United States, 468 U.S. 317 (1984).

621. State v. Miller, 289 S.C. 426, 427, 346 S.E.2d 705, 706 (1986). In South Carolina the State probably could appeal the granting of a defendant's pretrial motion to dismiss for double jeopardy. *See infra* note 660 and accompanying text.

622. 289 S.C. 426, 346 S.E.2d 705 (1986).

623. *Id.* at 427, 346 S.E.2d at 706 (construing S.C. CODE ANN. § 14-3-330 (Law. Co-op. 1976)).

624. *See* State v. Burbage, 51 S.C. 284, 287, 28 S.E. 937, 938 (1898).

625. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 501 (1978).

626. *E.g.*, United States v. Salerno, 868 F.2d 524, 540 (2d Cir.), *cert. denied*, 491

adopted similar procedures that allow interlocutory appeals of pretrial denials of nonfrivolous double jeopardy claims.[627]

b. Appeals by the Government

The common law prohibits appeals by the government absent express statutory authorization.[628] As the Supreme Court observed a century ago, "it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes."[629] Consequently, given the limited federal statutory authorization for appeals by the government, the Court has had few opportunities to consider the constitutional limitations on governmental appeals.[630]

Currently, however, the Criminal Appeals Act authorizes federal appeals of orders dismissing indictments or granting new trials, "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."[631] The legislative history of the Act evinces an intent "to extend the Government's appeal rights to the constitutional limits."[632]

In determining the constitutional limitations on the government's right to appeal, the Court has emphasized that a primary purpose of the Double Jeopardy Clause is to protect one who has been acquitted from being tried again for the same offense. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal. . . could not be reviewed, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'"[633] Consequently, the government may not appeal a judgment of acquittal following the discharge

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U.S. 907 (1989). For additional authority, see Clauson, *supra* note 12, at 1332 nn.1571-73 and accompanying text.

627. *E.g.*, Patterson v. State, 287 S.E.2d 7 (Ga. 1982); Commonwealth v. Brady, 508 A.2d 286 (Pa. 1986); Trimboli v. MacLean, 735 S.W.2d 953 (Tex. Ct. App. 1987).

628. United States v. Sanges, 144 U.S. 310 (1892). This is not the view of the South Carolina Supreme Court. *See, e.g.*, State v. Holliday, 255 S.C. 142, 177 S.E.2d 541 (1970).

629. *Sanges*, 144 U.S. at 312.

630. *See* United States v. Wilson, 420 U.S. 332, 339 (1975). Earlier in its opinion, the *Wilson* Court discussed early appellate statutes and their interpretations. *Id.* at 336-37.

631. 18 U.S.C. § 3731 (1988). The statute was passed as Title III of the Omnibus Crime Control Act of 1970, Pub. L. No. 95-644, 84 Stat. 1890.

632. *Wilson*, 420 U.S. at 338.

633. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (quoting United States v. Ball, 163 U.S. 662, 671 (1896)).

of a deadlocked jury, because a successful appeal would necessitate retrial.[634]

The same result obtains both when the court grants a demurrer at the end of the government's case because of insufficient evidence,[635] and when the court enters a judgment of acquittal even though based on an erroneous evidentiary ruling improperly excluding important governmental evidence.[636] A dismissal at the end of all the evidence for prejudicial pre-indictment delay would not be tantamount to an acquittal and could not be appealed because the defendant was the party that sought an end to the trial without a jury's determination on guilt or innocence.[637]

Appeal is permitted, however, in the case of a dismissal for prejudicial pre-indictment delay following the jury's guilty verdict.[638] If the government succeeds on appeal, additional trial court proceedings are not necessary. The court can enter a judgment of guilty based on the jury's original verdict, and the defendant would not be subjected to successive prosecutions for the same offense.[639]

In South Carolina the State's right of appeal is defined by judicial decision rather than by statute.[640] Moreover, the right extends to an order quashing an indictment,[641] a judgment "reversing or setting aside a conviction on purely legal grounds,"[642] and an order granting a new trial if based on error of law or manifest abuse of discretion.[643]

State v. Holliday[644] is an example of the second type of case. In *Holliday* the State appealed a circuit court's decision that reversed a conviction in magistrate's court on the grounds that an illegal arrest vitiated the conviction.[645] *Holliday* is consistent with *United States v. Wilson*[646] because the State's success resulted in an order affirming the original conviction in the magistrate's court and did not expose the defendant to another trial.

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634. *Id.* at 570. Retrial following a mistrial granted because of a deadlocked jury is generally permissible. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). accompanying text.

635. Smalis v. Pennsylvania, 476 U.S. 140 (1986).

636. Sanabria v. United States, 437 U.S. 54 (1978).

637. United States v. Scott, 437 U.S. 82, 99 (1978).

638. United States v. Wilson, 420 U.S. 332 (1975).

639. *Id.* at 353.

640. State v. Holliday, 255 S.C. 142, 144, 177 S.E.2d 541, 542 (1970).

641. State v. Kirkland, 282 S.C. 14, 317 S.E.2d 444 (1984).

642. *Holliday*, 255 S.C. at 145, 177 S.E.2d at 543 (citations omitted).

643. State v. Johnson, 123 S.C. 50, 115 S.E. 748 (1923).

644. 255 S.C. 142, 177 S.E.2d 541 (1970).

645. *Id.* at 145-147, 177 S.E.2d at 543.

646. 420 U.S. 332 (1975).

Since the early nineteenth century, it has been well settled in South Carolina that the State cannot appeal an acquittal,[647] even if the acquittal is predicated on erroneous rulings of law.[648] In *State v. Dasher*[649] the trial judge disagreed with the jury's assessment of the evidence and entered a verdict of not guilty following the jury's verdict of guilty. The supreme court granted the State's appeal and characterized the judge's action as an error of law because a trial judge lacks authority to weigh the evidence.[650] The court reinstated the jury's guilty verdict and remanded for sentencing.[651] Two justices in *Dasher* characterized the result below as an acquittal from which the State has no authority to appeal.[652]

Several South Carolina cases contain dicta suggesting that an acquittal procured through fraud would be a nullity and would not bar reprosecution.[653] However, no reported cases involve acquittals procured through fraud. In *State v. Johnson*[654] the court entertained the State's appeal of an acquittal,[655] but ultimately rejected on the merits the State's contention that the acquittal was fraudulently procured.[656]

In *State v. McKnight*[657] the court held that the State can take an interlocutory appeal from "[a] pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case."[658] The court relied on a statutory provision conferring appellate jurisdiction from "[a]n order affecting a substantial right made in an action when such order . . . in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action."[659] Allowing the interlocutory appeal serves the State's interest in enforcing its criminal laws because the suppression order, even if erroneous, could result in an acquittal from which the State could not appeal. An interlocutory appeal allows the appellate court to correct any erroneous order of suppression. The court's reasoning in *McKnight* would also allow the State to appeal other pretrial rulings adverse to the State, including the

647. State v. Wright, 3 S.C. (2 Tread.) 517 (1814).
648. State v. Gathers, 15 S.C. 370 (1881).
649. 278 S.C. 395, 297 S.E.2d 414 (1982).
650. *Id.* at 400, 297 S.E.2d at 416-17.
651. *Id.*
652. *Id.* at 400, 297 S.E.2d at 417 (Ness, J., dissenting).
653. *See, e.g.*, State v. Johnson, 248 S.C. 153, 159, 149 S.E.2d 348, 350 (1966); State v. Howell, 220 S.C. 178, 189, 66 S.E.2d 701, 706 (1951).
654. 248 S.C. 153, 149 S.E.2d 348 (1966).
655. *Id.* at 159, 149 S.E.2d at 350.
656. *Id.* at 164, 149 S.E.2d at 353.
657. 287 S.C. 167, 337 S.E.2d 208 (1985).
658. *Id.* at 168, 337 S.E.2d at 209.
659. S.C. CODE ANN. § 14-3-330(2)(a) (Law. Co-op. 1976).

granting of the defendant's motion to dismiss because of double jeopardy.[660]

4. Remedy

In subsequent-prosecution cases, the remedy for a double jeopardy violation is to prohibit the jeopardy-barred trial.[661] In multiple-prosecution cases, the remedy is reversal of the jeopardy-barred conviction.[662] Finding an appropriate remedy becomes complicated when some, but not all, of the charges are barred by the Double Jeopardy Clause.

For example, in *Green v. United States*[663] the defendant was originally charged with first degree murder, but found guilty of murder in the second degree. After the conviction was reversed, the defendant was reprosecuted and convicted of first degree murder. The Court concluded that the initial jury's silence on murder in the first degree was an implied acquittal of that charge; therefore, the Double Jeopardy Clause precluded retrial.[664] However, the Court did not elaborate on an appropriate remedy and remained silent about the conviction for second degree murder.

Reprosecution and conviction on the second degree charge was not prohibited by the Double Jeopardy Clause.[665] But, could the lower court merely reinstate the second degree murder conviction in light of the second jury's guilty verdict of the greater offense of first degree murder? Defense strategy in a second degree murder trial might be considerably different from that in a first degree murder trial. Therefore, it does not necessarily follow that a jury which convicted of second degree murder when instructed on first degree murder would inevitably convict on second degree murder in the absence of the greater charge.

In *Price v. Georgia*[666] the Court first gave more detailed attention to the remedy issue. The defendant in *Price* was originally charged with murder, but was convicted of the lesser included offense of manslaughter.

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660. The defendant is not allowed an interlocutory appeal. The defendant's interest in vindicating Fourth Amendment rights can be served adequately through appeal of denial of a suppression motion following conviction. However, a lack of access to interlocutory appeal of the denial of a double jeopardy dismissal motion would appear to frustrate the basic purposes of the Double Jeopardy Clause. *See supra* notes 618-627 and accompanying text.

661. Abney v. United States, 431 U.S. 651 (1977).

662. *E.g.*, Brown v. Ohio, 432 U.S. 161 (1977).

663. 355 U.S. 184 (1957).

664. *Id.* at 198. The doctrine of implied acquittal is discussed *supra* notes 136-145 and accompanying text.

665. United States v. Ball, 163 U.S. 662, 672 (1896).

666. 398 U.S. 323 (1970).

After he successfully appealed, he was again tried for murder and again convicted of manslaughter. Retrial on the murder charge violated the Double Jeopardy Clause as interpreted in *Green*, but the retrial for manslaughter was permissible under *Ball*. Nonetheless, the Court unanimously reversed the second manslaughter conviction because of concern that the presence of the unconstitutional murder charge prompted a compromise verdict.[667] The case was remanded for a determination of whether state law permitted a third trial for manslaughter.[668]

In *Morris v. Matthews*[669] the Court refined *Price*, noting that *Price* did not mandate automatic retrial whenever one is convicted of a lesser included offense of a jeopardy-barred charge. Reversal of the conviction on the lesser charge depends upon the likelihood that the conviction on the lesser charge was influenced by the trial on the greater. "[T]he charge of the greater offense for which the jury was unwilling to convict also made the jury less willing to consider the defendant's innocence on the lesser charge."[670]

The defendant in *Matthews* was found guilty of a jeopardy-barred offense. The Court concluded that reduction by an appellate court to a conviction for a nonjeopardy-barred lesser included offense was an adequate remedy unless the defendant could "demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense."[671] The Court reasoned that, because the jury necessarily found all elements of the lesser included offense when it found him guilty of the greater offense, the burden should shift to the defendant to establish a "reasonable probability" of prejudice.[672]

B. Guilty Pleas

In *Menna v. New York*[673] the Supreme Court held, without dissent, that a guilty plea does not per se waive a double jeopardy claim. While a guilty plea is an admission of factual guilt and waives constitutional claims related to the establishment of guilt, the plea does not waive constitutional

667. *Price*, 398 U.S. at 331.

668. *Id.* at 332.

669. 475 U.S. 237 (1986).

670. *Id.* at 245.

671. *Id.* at 246-47. The defendant's conviction of the jeopardy-barred offense of aggravated murder had been reduced by a state appellate court to the nonjeopardy-barred offense of murder.

672. *Id.* The Court rejected the lower court's standard of a "reasonable possibility" of prejudice as not being "sufficiently demanding." *Id.* at 247.

673. 423 U.S. 61 (1975).

claims against the right of the court to convict regardless of guilt.[674]

Relying on a footnote observation in *Menna*, the Court in *United States v. Broce*[675] limited the *Menna* rule to situations in which the double jeopardy defect is apparent on the face of the record.[676] The indictment in *Menna* duplicated the earlier charges of which the defendant had already been convicted. By contrast, the *Broce* indictment did not indicate that the two alleged conspiracies were part of a single overarching conspiracy to engage in multiple acts of misconduct.[677]

The *Broce* Court did not find that the defendants had waived their double jeopardy claim. Indeed, the Court could not have so held because the defendants' original attorney swore that he had never discussed the double jeopardy issue with them. Instead, the Court observed that particular defenses can be irretrievably lost without a conscious waiver. Accordingly, the Court held that the defendants had relinquished their double jeopardy claim.[678]

In *Ricketts v. Adamson*[679] the Court held that a double jeopardy claim can be waived by a plea bargain and that a particular claim was waived even though the agreement did not explicitly mention double jeopardy.[680] The defendant in *Adamson* was charged with first degree murder, but was allowed to plead guilty to second degree murder, with a specified sentence, in exchange for agreeing to testify against other persons allegedly involved in the murder. The agreement provided that in the event of the defendant's failure to testify "'this entire agreement is null and void and the original charge will be *automatically* reinstated'" and "'the parties shall be returned to the position they were in before this agreement.'"[681]

The trial court accepted the defendant's plea, and he testified against the others. The other defendants were convicted of first degree murder. However, following reversal of their convictions on appeal, the defendant refused to testify at their retrial. The court vacated the defendant's second

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674. *Id.* at 63 n.2. The *Menna* Court relied on Blackledge v. Perry, 417 U.S. 21 (1974), in which the Court held that a guilty plea did not waive a due process challenge to the State's prosecuting that particular charge.

675. 488 U.S. 563 (1989).

676. *Id.* at 575 ("'We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute.'") (quoting *Menna*, 423 U.S. at 63 n.2).

677. *Id.* at 575-76.

678. *Id.* at 572-74. Waiver requires a conscious awareness of what is waived, but apparently relinquishment does not.

679. 483 U.S. 1 (1987).

680. *Id.* at 9-10.

681. *Id.* at 9.

degree murder conviction and tried him on the original indictment. The defendant was convicted and sentenced to death.[682] The Supreme Court concluded that by the express terms of the agreement the defendant's refusal to testify negated the bargain, placing him back in the original position before the bargain was entered, at which point he had no double jeopardy claim.[683]

The *Adamson* Court held that the defendant waived his double jeopardy claim that his conviction of second degree murder, based on his guilty plea, precluded the subsequent charge of first degree murder, the former being a lesser included offense of the latter. Ordinarily, this would be a valid claim to the Double Jeopardy Clause's protection against successive prosecution for the same offense.[684] But, when the defendant violated his plea agreement, the State argued that the plea was accepted over the State's objection because the State's consent was conditional on the defendant's testimony.

The situation in *Adamson* invokes the rule of *Ohio v. Johnson*:[685] When one is charged with greater and lesser included offenses in a single indictment and enters a plea of guilty to the lesser offense over the State's objection, the State may continue to prosecute the greater offense charged in that indictment. In *Johnson* the defendant was charged with murder, involuntary manslaughter, aggravated robbery, and grand theft. Over the State's objection, the trial court accepted the defendant's guilty pleas to involuntary manslaughter and grand theft—lesser included offenses of murder and aggravated robbery, respectively—and dismissed the greater offenses as barred by the Double Jeopardy Clause.[686]

Given the state court's decision that the legislature did not intend multiple punishment for the greater and lesser included offenses, the *Johnson* Court agreed that the Double Jeopardy Clause would preclude punishment for all the offenses. However, the ban on multiple punishments would not stop the State from prosecuting the defendant for the greater offenses. Only if the defendant were convicted of the greater offenses would the court have to address the multiple-punishment issue.[687] Because all the offenses were charged in a single indictment, and because the State tried to establish them all in a single proceeding, the ban on successive prosecutions was no bar to the State's proceeding on the greater offenses.[688]

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682. *Id.* at 7.

683. *Id.* at 10.

684. *See* Brown v. Ohio, 432 U.S. 161, 168 (1977), *discussed supra* notes 301-306 and accompanying text.

685. Ohio v. Johnson, 467 U.S. 493 (1984).

686. *Id.* at 494.

687. *Id.* at 499-500.

688. *Id.* at 502.

In *Kelly v. State*,[689] decided after *Menna* but before *Broce* and *Adamson*, the South Carolina Supreme Court held that a defendant's plea of guilty waived what would have otherwise been a valid double jeopardy claim.[690] The defendant was indicted for armed robbery, robbery, and grand larceny in connection with a single criminal transaction, but was tried only for armed robbery and was acquitted. He subsequently entered a plea of guilty to grand larceny in return for the solicitor's promise to drop unrelated charges.[691] As was true in *Menna*, but unlike *Broce*, the double jeopardy violation in *Kelly* was clear on the face of the record. Nonetheless, the court found that the defendant made a "'conscious and calculated decision' to accept the State's offer and waive appellant's double jeopardy claim."[692]

It is well established that the Double Jeopardy Clause permits retrial of one whose conviction is overturned on appeal.[693] This result is not altered by the fact that the prior conviction was based on a guilty plea coerced by the trial judge's comments.[694] Reversal of such a conviction is not significantly different from a conviction reversed because of an inadmissible coerced confession.[695] Had the defendant moved for a mistrial instead of changing his plea to guilty, the Double Jeopardy Clause would not have precluded his retrial.[696]

A guilty plea may be vitiated by defense counsel's lack of familiarity with the law of double jeopardy. In *Jivers v. State*[697] the defendant pleaded guilty to a criminal domestic violence charge. Subsequently, he also entered a guilty plea to assault and battery with intent to kill, based on the same incident. Counsel, apparently relying on the *Blockburger* test for multiple prosecutions, had advised the defendant that he had no valid double jeopardy claim.[698] Counsel's unfamiliarity with the same-conduct definition of same offense caused the court to conclude that his representation was ineffective

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689. 274 S.C. 613, 266 S.E.2d 417 (1980).

690. *Id.* at 615-16, 266 S.E.2d at 418. The *Kelly* court did not refer to *Menna*.

691. *Id.* at 614, 266 S.E.2d at 418.

692. *Id.* at 615-16, 266 S.E.2d at 418. *Kelly* thus anticipated the Court's holding in *Adamson*.

693. United States v. Ball, 163 U.S. 662 (1896).

694. United States v. Tateo, 377 U.S. 463 (1964).

695. *Id.* at 466-67.

696. *Id.* at 467. *Tateo*, of course, predated Oregon v. Kennedy, 456 U.S. 667 (1982), in which the Court concluded that a defendant deliberately goaded by the prosecutor into moving for a mistrial could not be retried. *See supra* text accompanying note 480. There is nothing in the *Tateo* Court's opinion to suggest that the trial judge's comments were so motivated.

697. 304 S.C. 556, 406 S.E.2d 154 (1991).

698. *Id.* at 558, 406 S.E.2d at 156.

and that the defendant was entitled to relief from the second conviction.[699]

IX. CONCLUSION

The decisional law of double jeopardy seems even more entangled than when then Justice Rehnquist compared it to the Sargasso Sea a dozen years ago.[700] Additionally, these waters have become notably turbulent with the recent five-to-four overruling of a major precedent hardly three years old. When, in *United States v. Dixon*,[701] the Court rejected the same-conduct test of *Grady v. Corbin*,[702] it left confusion in its wake. The five-justice majority in *Dixon* fractured three-to-two on how the same-elements test of *Blockburger v. United States*[703] should be applied to resolve the double jeopardy dilemma of successive prosecutions for a single act.[704]

The different destinations reached by the majority and the dissenters in *Dixon* are a function of the "judicial navigators'"[705] different uses of the instrument of precedent. Focusing on what he perceived to be the precise holdings of earlier cases, Justice Scalia found no precedential support for *Grady*'s same-conduct test.[706] Justice Souter not only found support for *Grady* in the holdings of these cases, but, more importantly, looked to precedent to discover the historical purposes of the Double Jeopardy Clause. Souter found that a "central purpose" of the Clause is to avoid the various costs of successive prosecution for the same offense, including the opportunity for the State to rehearse its proof and increase the risk of convicting innocent persons. Souter then argued that the same-conduct test was essential to serve that purpose.[707]

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699. *Id.* at 560, 406 S.E.2d at 157. Although Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993), had not been decided at the time of the deficient advice, the South Carolina Supreme Court had already responded to the Supreme Court's pointed dictum in Illinois v. Vitale, 447 U.S. 410 (1980), and had adopted the same-conduct test for same offense. *See* State v. Carter, 291 S.C. 385, 353 S.E.2d 875 (1987); State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986).

The *Jivers* court rejected the State's guilty plea waiver argument, distinguishing Kelly v. State, 274 S.C. 613, 266 S.E.2d 417 (1980), because of defense counsel's competent representation in *Kelly*. *Jivers*, 304 S.C. at 560, 406 S.E.2d at 157.

700. Albernaz v. United States, 450 U.S. 333, 343 (1981).

701. 113 S. Ct. 2849 (1993).

702. 495 U.S. 508 (1990), *overruled by Dixon*, 113 S. Ct. 2849.

703. 284 U.S. 299 (1932).

704. *See supra* notes 387-397 and accompanying text.

705. *Albernaz*, 450 U.S. at 343.

706. *Dixon*, 113 S. Ct. at 2860-64.

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

The next task for the Court in this immediate area will be to determine how to apply *Blockburger* to resolve successive prosecution cases. Should the earlier offense be defined in a generic sense, as Chief Justice Rehnquist argued,[708] or with regard to the precise crime as actually prosecuted, as Justice Scalia maintained?[709]

The author submits that neither this nor any other double jeopardy issue will be resolved in such a way as to comprehensively smooth these troubled waters unless the entire Court can focus on the underlying purposes of the Double Jeopardy Clause, as Justice Souter did in *Dixon*.

708. *Id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part).
709. *Id.* at 2857-58.